TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~647~~. 3479166

THE MAYOR AND CITY COUNCIL OF NASHVILLE, PLAINTIFFS IN ERROR,

vs.

WILLIAM RAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED APRIL 22, 1872.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the middle district of Tennessee, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court before you, between William Ray, the plaintiff in said suit, and The Mayor and City Council of Nashville, defendants therein, a manifest error hath happened to the great damage of the said mayor & city council of Nashville, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid
2 being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this first Monday in December, in the year of our Lord one thousand eight hundred and seventy.

E. R. CAMPBELL,
Clerk of the Circuit Court of the U. S. for the Mid. Dist. of Tennessee.

Filed, and a copy of the same deposited in my office for defendant in error, Nov. 13, 1871.

E. R. CAMPBELL, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

To William Ray, greeting:

You are hereby cited to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein The Mayor and City Council of Nashville are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment, in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court of the United States, this 13th day of November, (1871,) in the year of our Lord eighteen hundred and seventy-one.

CONNALLY F. TRIGG,
U. S. District Judge, presiding.

Service of the above citation acknowledged by the undersigned attorneys of record of the defendant in error, Nov. 14, 1871.

M. VAUGHN, &
JOHN C. & JOHN M. GANT,
Attorneys of William Ray.

4 MIDDLE DISTRICT OF TENNESSEE, *ss:*

At a circuit court of the United States begun and held in the capitol of said State, in Nashville, in and for the district aforesaid, on the third Monday, being the 16th day of October, A. D. 1871, neither of the judges of said court appearing, thereupon the marshal adjourned the court until *until* to-morrow morning at 10 o'clock.

TUESDAY MORNING, *October* 17, 1871.

Court met pursuant to adjournment.
Present the Hon. Connally F. Trigg, judge.
The following proceedings were had, to wit:

WILLIAM RAY
vs.
THE MAYOR & CITY COUNCIL OF NASHVILLE. } No. 1401.

On the 27th day of February, 1869, a declaration was filed in the above cause, which is as follows:

5 Circuit court of the United States for the middle district of Tennessee. April term, 1869.

William Ray, a citizen of the State of New York, by attorney, complains of The Mayor and City Council of Nashville, a corporation chartered by the laws of the State of Tennessee, which is in court by summons of a plea of trespass on the case on premises.

For that, heretofore, to wit, on Oct. 3, 1867, A. E. Alden, mayor, and Rob't C. Foster, 3rd recorder of said corporation, drew a certain draft, in writing, bearing said date, No. 165, and then and there addressed the same to the treasurer of said corporation, whereby they requested him to pay to John Thompson, or bearer, thirty-seven $\frac{50}{100}$ dollars, which draft was duly accepted by said treasurer, on December 10, 1867.

And on the following days respectively, viz: May 15th, June 14th, June 14th, Sept. 3d, Oct. 22d, Nov. 13th, Nov. 13th, Nov. 13th, Nov. 20th, Nov. 17th, Nov. 13th, Nov. 13th, Nov. 13th, Dec'r 11th, Dec'r 21st,
6 Dec'r 23rd, Dec'r 22nd, in the year 1868, and Feb'y 2, 1869, A. E. Alden, mayor, and W'm Mills, recorder, of said corporation, drew their certain checks or drafts, in writing, bearing said dates repectively, and then and there addressed the same to said treasurer, whereby they requested him to pay the following respective sums, viz: $300.00, $29.23, $40.10, $3.25, $750.00, $1,360.00, $408.00, $44, $40, $40, $33.59, $1,492.22, $3.66, $35, $1,095.00, $1,000, $718.50, $1,000 to the following payees respectively, or to the bearer of each respective draft, viz: Board of Education, or bearer; James Dwyer, or bearer, Nash. & Chattanooga R. R. Co., or bearer; Nash. & D. R. R. Co., or bearer; Mrs. A. Cheatham, or bearer; H. Hanmer, or bearer; H. H. Hanmer, or bearer; G. W. Marshall, or bearer; Simon Hill, or bearer; Richard Jones, or bearer; Greway & Albertson, or bearer; Nashville Gas-Light Co., or bearer; Thomas Beard, or bearer; Morris Brannen, or bearer; Mrs. Toney, or bearer; A. J. Duncan, or bearer; Haslum & Brother, or bearer; Julius Sax, or bearer. The said checks, bearing the following numbers respectively, viz: No. 1864, 2112, 2075, 2482, 2808, 2965,
7 2970, 2996, 3056, 3051, 2873, 2898, 2917, 3197, 3412, 3521, 3467, 4250. Said drafts were all duly presented to said treasurer for acceptance and all duly accepted on the following days repectively,

viz: June 11th, 1868; Dec. 17th, '68; Dec. 17th, '68; Dec. 17th, '68; Oct. 29th, 1868; Nov. 13th, '68; Nov. 13th, '68; Dec. 17th, 1868; Dec. 17th, '68; Dec. 17th, '68; Dec. 17th, '68; Nov. 13th, '68; Dec. 17th, '68; Dec. 17th, 1868; Dec. 21st, 1868; Dec. 26, '68; Dec. 22nd, '68; Feb'y 3, 1869.

Said treasurer accepted each of the foregoing checks, drafts, or orders by writing his name on the back thereof; thus, "Tho's G. Magrane, treas." No. 1864 being accepted by Rufus Henry, former treasurer of the defendant; also writing, on each check or order in writing the date of acceptance or presentation thereof. Said checks or drafts were all drawn according to the laws of said corporation, enacted pursuant to its charter—the established and regular mode of paying out funds for any purpose, by said corporation, being for the recorder to issue his check for the amount to be paid upon the treasurer,
8 and this to be countersigned by the mayor—all of which checks or drafts, together with the acceptances or endorsements thereon, are here to the court shown. Plaintiff avers that he is the legal owner of said checks or drafts.

By the checks and acceptances aforesaid the said corporation became liable to pay said checks or drafts according to their tenor and effect; each of said checks or drafts to the payee or bearer, and being so liable, and in consideration thereof, said corporation, on the day of , 1869, undertook and promised to pay the same on demand to the plaintiff as the lawful holder and bearer, each with interest from the date of acceptance or presentation. Although often demanded, the said corporation, for want of funds, has failed to pay any one or any part of said checks or drafts.

And further, on the day of , 186 , the said corporation was indebted to the plaintiff in the sum of ten thousand dollars
9 for money loaned by plaintiff to the defendant, and in a like sum for money paid out, expended, and advanced for defendant for its use and benefit, and at its request. In a like sum for moneys had and received by defendant for plaintiff's use; in a like sum for the balance of an account then stated, between plaintiff and defendant, and found to be due from defendant to plaintiff.

And being thus indebted, and in consideration thereof, defendant then undertook and promised to pay said sums to plaintiff when requested so to do; and although often requested to pay the same, no part thereof has ever been paid, but remains due and wholly unpaid. By reason of the premises the plaintiff has been damaged to the amount of ($12,000,) twelve thousand dollars, and therefore he sues, by

MICHAEL VAUGHN, *Atto.*

On the 27th day of Feb'y, 1869, a summons was issued in said cause, which is in the words and figures following, to wit:

10 *Summons.*

The President of the United States of America, to the marshal of the middle district of Tennessee, greeting:

You are hereby commanded to summon the Mayor & City Council of Nashville, a municipal corporation chartered by the laws of the State of Tennessee, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit for the district of Middle Tennessee, at the Federal court-room at Nashville,

in said State, on the third Monday in April next, then and there to answer William Ray, a citizen of the State of New York, of a plea of trespass on the case on promises, to plaintiff's damage twelve thousand dollars. Herein fail not, and have then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this the third Monday in October, in the year of our Lord eighteen hundred and sixty-eight, and of the Independence of the United States the 93rd.

[SEAL OF THE COURT.] E. R. CAMPBELL, *Clerk.*

11 (Indorsed:) No. 1401. William Ray versus The Mayor & City Council of Nashville. Summons.

This summons was issued on the 27 day of February, 1869.
E. R. CAMPBELL, *Clerk.*

Came to hand same day issued. Executed upon W'm Mills, recorder of the corporation of Nashville, and delivered to him a copy of the declaration March 10, 1869. Executed on W. C. Kinney, mayor pro tem., and delivered to him a copy of the declaration M'ch 13, 1869.
E. R. GLASCOCK, *Marshal,*
By N. M. SMITH, *D. M.*
M. VAUGHN, *Att'y.*

12 On the 21st day of April, 1869, a plea was filed, which is as follows, viz:

U. S. circuit court, April term, 1869.

W'M RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

The said defendants, by D. W. Peabody, their attorney, come and defend the wrong and injury, when, &c., and as to the first count say that they did not undertake or promise in manner and form, as the said plaintiff hath above complained against them, and of this they put themselves upon the country.

And for further pleas to the other counts in said declaration, defendants say that they did not undertake and promise, and do not owe, the said sums of money above demanded, nor any part thereof, in manner and form, &c., and of this they put themselves upon the country.
D. W. PEABODY, *Att'y for Def'ts.*

And the plaintiff, by att'y, comes and joins issue upon said plea.
MICHAEL VAUGHN, *Att'y.*

13 On the 7th day of May, 1869, an entry was made in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

The parties appear, by their attorneys, and thereupon came a jury of good and lawful men, to wit, John Thomas, R. H. Stem, John N. Ward,

C. B. Hall, Thomas W. Ballow, T. D. Thompson, R. M. White, D. E. Lord, Herbert, Tonnes, F. Fonville, and D. Randall, who, being elected, tried, and sworn well and truly to try the issue joined, after hearing a portion of the evidence were respited until to-morrow morning, at 10 o'clock.

On the 8th day of May, 1869, a judgment was rendered in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

14 The parties again appeared, by their attorneys, and came also the same jury empannelled in this cause on yesterday, who, after hearing the balance of the evidence, the argument of counsel, and the charge of the court, upon their oaths do say that they find the issues in favor of the plaintiff, and assess his damages, sustained by reason of the non-performance of the promises and undertakings in the declaration mentioned, at the sum of eight thousand six hundred and fifty-six $\frac{72}{100}$ dollars.

It is therefore considered by the court that the plaintiff recover of the defendant his damages aforesaid by the jury aforesaid assessed, and also his costs by him about his suit in this behalf expended, and that fi. fa. issue for the same.

On the 17th day of May, 1869, a motion for a new trial of said cause was entered, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

15 Came the parties, by their attorneys, and the defendant, by its attorneys, moved the court for a new trial; which motion is continued over for argument.

On the 20th day of May, 1869, an entry was made in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

In this cause the motion heretofore entered for a new trial is continued until the next term.

On the 16th day of Feb'y, 1870, an order was entered in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

The parties again appeared by their attorneys, and after argument of counsel on both sides, it is considered by the court that the motion

for a new trial be sustained, upon condition that the defendant
16 pay all the costs incurred in said cause to date. It is therefore ordered that the former verdict and judgment be set aside, and a new trial awarded.

On the 17th day of Feb'y, 1870, an entry was made in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

In this cause leave is given the plaintiff to amend his pleadings within the first three days of the next term, and to the defendant to file its pleas within the succeeding week, so as not to delay the trial

On the 29th day of April, 1870, the defendant, by leave of the court, filed the following pleas:

Circuit court U. S., Mid. dist. Tenn. April term, 1870.

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

And the said defendant, by attorney, comes and craves oyer
17 of the said drafts in writing, (so called,) and they are read to it in the words and figures, as follows:

$1,000.] [No. 3,521.

NASHVILLE, *Dec.* 23, 1868.

Treasurer corporation of Nashville pay to A. J. Duncan, or bearer, one thousand dollars, on account of water-work.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Dec. 26, 1868.

$718.50.] [No. 3,467.

NASHVILLE, *Dec.* 22, 1868.

Tresurer corporation of Nashville pay to Haslum & Bro. or bearer, seven hundred and eighteen $\frac{50}{100}$ dollars, on account of street dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Dec. 22, 1868.

$37.50.] [No. 165.

NASHVILLE, *Oct.* 13, 1867.

Treasurer corporation of Nashville pay to John Thompson, or bearer, thirty-seven $\frac{50}{100}$ dollars, on account of street dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Rufus Henry, t'r, Dec. 10, 1867.

18 $300] [No. 1864.

NASHVILLE, *May* 15, 1868.

Treasurer corporation of Nashville pay to board of education, or bearer, three hundred dollars, on account of school dep't.

W'M MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Rufus Henry, t'r, June 11, 1868. Rec'd pay, Thos. Plater.

$1,000.] [No. 4250.

NASHVILLE, *Feb'y* 2, 1869.

Treasurer corporation of Nashville pay to Julius Sax, or bearer, one thousand dollars, on account of bills payable.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Feb'y 3, 1869.

$1,492.20.] [No. 2898

NASHVILLE, *Nov.* 13, 1868.

Treasurer corporation of Nashville pay to Nashville Gas-Light Co., or bearer, fourteen hundred and ninety-two $\frac{20}{100}$ dollars, on account of gas l't dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Nov. 13, 1868.

$1,095.00.] [No. 3412.

NASHVILLE, *Dec.* 21, 1868.

19 Treasurer corporation of Nashville pay to Mrs. Toney, or bearer, one thousand and ninety-five $\frac{00}{100}$ dollars, on account of St. Vincent Hospital.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Dec. 21, 1868.

$408.00] [No. 2970.

NASHVILLE, *Nov.* 13, 1868.

Treasurer corporation of Nashville pay to H. H. Hanmer, or bearer, four hundred & eight $\frac{00}{100}$ dollars, on account of fire dep't, net cash.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Nov. 13, 1868.

$750.00.] [No. 2808.

NASHVILLE, *Oct.* 22, 1868.

Treasurer corporation of Nashville pay to Mrs. A. Cheatham, or bearer, seven hundred and fifty $\frac{00}{100}$ dollars, on account of bills payable dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Oct. 29, 1868.

$1,360.05.] [No. 2965.

NASHVILLE, *Nov.* 13, 1868.

Treasurer corporation of Nashville pay to H. Hanmer, or bearer thirteen hundred and sixty $\frac{05}{100}$ dollars, on account of fire dep't.

20 W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Nov. 13, 1868.

$3.66] [No. 2917.

NASHVILLE, *Nov.* 13, 1868.

Treasurer corporation of Nashville pay to Thomas Beard, or bearer, three $\frac{66}{100}$ dollars, on account of street dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thomas G. Magrane, t'r, Dec. 17, 1868.

$3.25.] [No. 2482.

NASHVILLE, *Sept.* 3, 1868.

Treasurer corporation of Nashville pay to N. & D. R. R., or bearer, three $\frac{25}{100}$ dollars, on account of charity dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Dec. 17, 1868.

$35.00] [No. 3197.

NASHVILLE, *Dec.* 11, 1868.

Treasurer corporation of Nashville pay to Morris Brannon, or bearer, thirty-five $\frac{00}{100}$ dollars, on account of street dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. Magrane, t'r, Dec. 17, 1868.

21 $44.00.] [No. 2996.

NASHVILLE, *Nov.* 13, 1868.

Treasurer corporation of Nashville pay to G. W. Marshall, or bearer, forty-four $\frac{00}{100}$ dollars, on account of school dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. Magrane, t'r, Dec. 17, 1868.

$40.00.] [No. 3056.

NASHVILLE, *Nov.* 20, 1868.

Treasurer corporation of Nashville pay to Simon Hill, or bearer, forty $\frac{00}{100}$ dollars, on account of springs, dep't of salary.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. Magrane, t'r, Dec. 17, 1868.

$40.10.] [No. 2075.

NASHVILLE, *June* 14, 1868.

Treasurer corporation of Nashville pay to N. & C. R. R., or bearer, forty $\frac{10}{100}$ dollars, on account of charity dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. Magrane, t'r, Dec. 17, 1868.

$33.59] [No. 2873.

NASHVILLE, *Nov.* 13, 1868.

Treasurer corporation of Nashville pay to Grewar & Albertson,
22 or bearer, thirty-three $\frac{59}{100}$ dollars, on account of street dep't.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane, t'r, Dec. 17, 1868.

$40.00.] [No. 3051.

NASHVILLE, *Nov.* 17, 1868.

Treasurer corporation Nashville pay to Richard Jones, or bearer, forty dollars, on account of market-house.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Thos. G. Magrane t'r. Dec. 17, 1868.

$29.25.] [No. 2112

NASHVILLE, *June* 14, 1868.

Treasurer corporation Nashville pay to James Dwyer, or bearer, twenty-nine $\frac{25}{100}$ dollars, on account of work-house dep't, C. C.

W. MILLS, *Recorder.*

A. E. ALDEN, *Mayor.*

(Endorsed:) Tho's G. Magrane t'r. Dec. 17, 1868.

All which writings being read and heard, defendant, for plea, says that none of said writings is its act or deed, not having been executed by it, or by any person authorized to bind it in the premises, and
23 of this, defendant puts itself upon the country.

E. H. EWING,
N. F. &. H. COOPER,
And JNO. LELLYETT,
Attorneys.

In testimony whereof the defendant hath caused its corporate seal to be affixed hereto and attested by its mayor and recorder, this 28th day of April, 1870. { CORPORATE SEAL OF THE CITY OF NASHVILLE. }

THO'S J. HAILE, *Recorder.*
K. J. MORRIS, *Mayor.*

And for further plea in this behalf the defendant says that the said supposed debt sued on in this action is usurious, to wit, to the amount of $1,686.00, and this defendant is ready verify.

E. H. EWING,
N. F. & H. COOPER,
And JOHN LELLYETT,
Attorneys.

In testimony whereof defendant hath caused its corporate seal to be hereto affixed, and attested by its mayor & recorder, this 28th day of April, 1870. { CORPORATE SEAL OF THE CITY OF NASHVILLE. }

THO'S J. HAILE, *Recorder.*
K. J. MORRIS, *Mayor.*

24 And for further plea in this behalf defendant says that it did not undertake, or promise in manner or form as plaintiff hath in his declaration alleged, and of this it puts itself upon the country.

E. H. EWING,
N. F. & H. COOPER,
And JOHN LELLYETT,
Att'ys.

On the 3rd day of May, 1870, a motion was entered in said cause which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

In this cause comes the plaintiff, by attorney, and moves the court to strike from the files the three pleas, non est factum, because it is not sworn to; the plea of usury because it is not sworn to, and because it sets out no usurious contract with any person or persons, and because it sets out no contract of any kind; the plea of non assumpsit, because it was plead at a former term of the court.

25 On the 9th day of May, 1870, an entry was made in said cause which is as follows:

Motion to strike out three pleas filed by defendant on the 29th April, 1870, of non est factum, of usury, and of assumpsit.

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

And thereupon came the parties, by their attorneys, and after argument of counsel and mature consideration by the court, it is ordered by the court that the said three pleas be stricken out, and that the defendant pay the cost incident to the filing of said three pleas, for which let fi. fa. issue.

And thereupon on said 9th day of May, 1870, the said defendant appeared in open court and filed the following affidavit to the truth of said plea of non est factum.

United States circuit court middle district of Tennessee.

Personally appeared before me E. R. Campbell, clerk of said
26 court, K. J. Morris, mayor of the corporation of Nashville, and John Lellyett, an attorney of said corporation, and each for himself made oath in due form of law that the above plea of non est factum, above written and offered to be filed in this cause, is true in substance and in fact, as therein set out.

K. J. MORRIS.
JOHN LELLYETT.

Sworn to & subscribed before me May 9, 1870.

E. R. CAMPBELL, *Clerk*,
By J. W. CAMPBELL, *D. C.*

And thereupon said plea of non est factum was by the court allowed to be re-filed.

And thereupon the plaintiff filed the following replication to said plea of non est factum,

And the plaintiff comes, and for replication to the defendant's plea of non est factum, doth the like.

VAUGH & J. C. & J. M. GANT,
Attorneys.

27 On the 4th day of May, 1871, an entry was made in said cause, which is as follows:

WILLIAM RAY
vs.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came the parties by their attorneys, and came also a jury of good and lawful men, to wit: John B. Parris, M. L. Fletcher, O. M. Blackman, M. C. Dibrett, J. G. Mitchell, R. P. Brooks, William Simonton, J. P. C. Reed, R. B. Moore, W. A. Garner, T. B. Askew, and W. A. Malone, who being elected, tried, and sworn, well and truly to try the issue joined, after hearing the evidence were respited until to-morrow morning at 9 o'clock.

On the 5th day of May, 1871, an entry was made, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came again the parties by their attorneys, and came again also
28 the same jury empannelled in this cause on yesterday who, after hearing the charge of the court, upon their oaths do say, that they find the issues in favor of the plaintiff, and assess the damages sustained by reason of the non-performance of the promises and undertakings in the declaration mentioned, at the sum of nine thousand six hundred and sixty one $\frac{38}{100}$ dollars.

And thereupon the defendants, by its attorney, moved the court to set aside the verdict of the jury, and grant a new trial, which motion is continued over until Monday morning next, for argument.

On the 11th day of May, 1871, an entry was made in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came the parties by their attorneys, and upon argument of counsel the motion of the defendant to set aside the verdict of the jury
29 heretofore entered in this cause, and grant a new trial, was granted on condition that said trial be had immediately.

On the 11th day of May, 1871, another entry was made in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came the parties by their attorneys, and came also a jury of good and lawful men, to wit: John B. Parris, Geo. A. Washington, Temple O. Harris, M. L. Fletcher, O. M. Blackman, Montgomery C. Dibrell, Jno. P. C. Reed, W. A. Garner, H. C. Jackson, Joseph Ramsey, A. F. Todd, and Daniel Guthrie, who being elected, tried, and sworn, well and truly to try the issues joined, after hearing a portion of evidence, were respited until to-morrow morning at 9 o'clock.

On the 12th day of May, 1871, an entry was made in said cause, which is as follows:

30 WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came again the parties by their attorneys, and came also the same jury, empannelled in this cause on yesterday, who, after hearing the balance of the evidence and the argument of counsel, and the charge of the court, were respited until to-morrow morning at 9 o'clock.

On the 13th day of May, 1871, an entry was made in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came again the parties by their attorneys, and came again also the same jury, heretofore empannelled in the cause, and thereupon the jury was further respited until Monday morning next at 10 o'clock.

On the 15th day of May, 1871, a mistrial was entered in said cause, which is as follows:

31 WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came again the parties by their attorney, and came also the same jury, heretofore empannelled in the cause, who upon their oaths do say

that they cannot agree as to their verdict, and thereupon by consent of parties Jno. B. Parris, one of the jurors was withdrawn, and the rest of the jurors from rendering a verdict were discharged.

On the 28th day of Oct., 1871, a judgment was rendered in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came the parties by their attorneys, and came also a jury of good and lawful men, to wit, John C. Webb, John Overton, John A. Freson, L. Oatman, Jefferson Martin, Thomas Olsen, R. C. McNairy, B. F. Carter,
W. H. P. Turner, James Scott, A. E. Trabue and E. F. Colyar,
32 who being elected, tried, and sworn well and truly to try the issues joined, after hearing the evidence, the argument of counsel, and the charge of the court, upon their oaths do say that they find the issues in favor of the plaintiff, and that the plaintiffs have sustained damages by reason of the non-performance of the promises and undertakings in the declaration mentioned, amounting to the sum of nine thousand eight hundred and seventy-six $\frac{44}{100}$ dollars.

It is therefore considered by the court that the plaintiff recover of the defendant the damages aforesaid by the jury aforesaid assessed, and also the costs by him about his suit in this behalf expended, and that fi. fa. issue for the same.

On the 6th day of November, 1871, a motion for a new trial was entered, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

33 Came the defendant, by its attorneys, and moved the court for a new trial, which motion is continued over for argument.

On the 13th day of November, 1871, an entry was made in said cause, which is as follows:

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

The parties appear by their attorneys, and the motion for a new trial in this cause heretofore made, was heard and overruled, and thereupon a bill of exception made at the trial, and signed by the Hon. H. H. Emmons, judge &c., before whom the case was tried, was filed and ordered to be made a part of the record.

And thereupon the defendant, The Mayor and City Council of Nashville, obtained a writ of error in due form of law, to carry the case to the Supreme Court of the United States, the plaintiff William Ray, acknowledging service of the citation and notice of the writ.

34 In the circuit court of the United States for the middle district of Tennessee.—October term, 1871.

WILLIAM RAY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Be it remembered that on the trial of this cause, the plaintiff offered

in evidence the several paper writings, nineteen in number, set out in full in the pleadings.

Plaintiff further introduced evidence to show that the signatures to said checks were genuine, and that they were the signatures of the officers authorized by city ordinance to sign and countersign checks upon the city treasury. And also evidence to show the genuineness of the seal of the corporation of Nashville impressed upon each of said checks; also evidence to show that the endorsements of Thomas G. Magrane and Rufus Henry, as they appear on said checks are genuine;

and that said Magrane and Henry were each at the time of his
35 endorsements, treasurer of said corporation. Also evidence tending to show, that for many years the custom of the defendant corporation had been to issue checks in form the same or similar to those sued on, in payment of debts, or to draw money from the city treasury; and that it had also been the custom for many years, when the treasurer failed to pay such checks on their first presentation, for him to write his name on the back of such checks, with the date of such presentation, and afterwards in the payment of such checks so endorsed to allow interest from the date so written thereon, and that it was usual to present such checks for endorsement to draw interest, when it was known there was no funds for their payment. Also evidence tending to prove that for many years it had been the well known custom of the proper collecting officers of the defendant corporation to receive such checks for taxes and other dues of said corporation. Also

evidence to show that at the time the checks sued on were made,
36 and at the time they were bought by plaintiff, the defendant corporation was largely involved in debt and financial embarrassment, and that many such checks were outstanding unpaid, and were commonly bought and sold in the market, and that nearly all of the taxes of the corporation were paid to the collector in such checks. Plaintiff further offered evidence tending to show, that at the time of the purchase of the checks sued on by plaintiff, and for some time previous, the taxes for the support of the public schools were collected in such checks, and that it was the practice of the collector to pay over to the secretary and treasurer of the board of education of said corporation, in such checks, the amount of school taxes collected by him, the said collector, and that such had been the practice for some five months next preceeding the purchase of the checks by plaintiff, and that for the same time it had been the practice of said secretary and treasurer

of the board of education to sell such checks so paid over to him,
37 and to use the proceeds of such sales in the payment of teachers. Also evidence to prove that all the checks sued on (except the check for $1,000 payable to Julius Sax) were so received for taxes by said collector, and that they were about the 28th of January, 1869, paid over by said collector to said secretary and treasurer, and by the latter sold to J. C. McCrory, as the agent of plaintiff to buy the same, at the rate of 80 cents on the dollar, soon after their receipt by the said secretary and treasurer, and that the proceeds of the sale of said checks were by him paid to female teachers employed in the public schools of defendant. Plaintiff also introduced evidence tending to prove that it had for years been the practice of the collector of defendant, in collecting checks for taxes, to pay out other checks previously collected

in making change; plaintiff further introduced evidence to prove
38 that his said agent McCrory bought the other check sued on from Julius Sax—the check for $1,000—on the 9th Feb'y, 1869, and paid 800\frac{80}{100}$ therefor.

In the course of the examination of plaintiff's witnesses, his witness, W'm Mills, in answer to a question of the plaintiff's counsel, stated that all of the checks sued on were made in the usual course of business of the defendant corporation, and issued for corporation purposes, which evidence was at the time objected to by defendant's counsel on the ground that the best evidence on this point would appear on the proper record of the corporation, which he then and there produced for the inspections of the witness and court. But the court overruled said objection, and admitted the evidence, to which ruling of the court the defendant, by attorney, then and there excepted.

And further, on the cross-examination of said witness, defend-
39 ant's counsel offered to prove by the said witness, who was the recorder and had kept, as such, the said record, that it was his uniform practice as such recorder, to keep a faithful and complete record of all of the proceedings of the defendant's boards of the city council; that said record showed in each month what accounts were allowed by council, and to show by said witness and said records that a number of said checks were actually issued upon accounts allowed by council: that other of said checks were issued in pursuance of city ordinance, but that the larger part of them were not allowed by council nor issued in pursuance of any city ordinance, and that no evidence could be found in said records of said latter checks being issued for any considerations or by any authority whatever; but the court refused to admit said evidence, to which ruling of the court refusing to admit the same, defendant by its counsel then and there excepted.

40 And defendant's counsel further offered to introduce proof tending to show that one of the said checks for $1,000, payable to A. J. Duncan, being one of the same not allowed by council, as aforesaid, was one of a large number of similar checks issued clandestinely upon a corrupt contract with a member of the city council, who acted in the matter without authority, and without any knowledge of the council, and that said check was issued upon no other authority than the direction of a member of the council; but the court refused to allow such evidence to be introduced, to which ruling of the court defendant by attorney then and there excepted.

Plaintiff further introduced parol evidence tending to prove that the members of the city council, the mayor and other city officers, in the performance of their official duties were informed of the practice pursued by the collector, to re-issue the checks which he had received in pay-
41 ment of taxes, by paying a portion of them over to the board of education. To this evidence defendant by attorney objected as inadmissable in any view, on the ground that such notice to the city council, and officers of a municipal corporation should be shown by its records, and documents on file in its archives, and that no grounds had been laid for the introduction of secondary evidence on this point, as by notice to defendant to produce books and papers, and their non-production, or any other lawful ground. But the court ruled to admit said parol evidence, to which ruling of the court defendant by attorney then and there excepted.

The plaintiff's witness, W'm Mills, who was recorder of the corporation of Nashville from October, 1867, to September, 1869, on cross-examination detailed and explained the practice pursued in the issuance of checks by himself and the mayor, Alden. In addition to the
42 checks issued by order of council in the allowance of accounts; proof was introduced tending to show that checks were frequently issued by order of the chairman of the finance committee without other

authority; and that the Sax check was one so issued. The check sued on by plaintiff payable to Julius Sax or bearer, and the other payable to A. J. Duncan or bearer, each for $1,000, are of those so ordered by Silas F. Allen, who was chairman of the finance committee. Witness knew both Sax & Duncan.

Plaintiff then offered parol evidence, tending to prove that the practice of issuing checks in the manner described by the witness, Mills, (as above,) and selling or hypothecating them for money was known to the city council through its official action, and had been pursued without objection for several months; which evidence was objected to by defendant's counsel as inadmissable.

The objection was overruled by the court, and the evidence admitted; to which ruling of the court admitting such evidence, the defend-
43 ant, by attorney, then and there excepted.

The plaintiff's witness, Julius Sax, on his examination and cross-examination, disclosed the following: Witness, on the 2nd of Feb'y, 1869, (as witness understood it,) loaned to the defendant $12,000 on four months' time. Witness made the negotiation altogether with said Silas F. Allen, who professed to act in the matter for defendant. Witness paid said loan, one-half in corporation checks of like character of some at least of those sued on in this action, and the other half was paid in cash, less the discount on the entire loan. Said Allen gave witness a note for said loan in words and figures following:

$12,000.] NASHVILLE, *Feb'y* 2, 1869.

Four months after date we promise to pay to Julius Sax or order, twelve thousand $\frac{00}{100}$ dollars, for value received, having deposited or pledged as collateral security for the payment of this note, Nashville corporation checks No. 4239 to 4254, inclusive, amounting to
44 sixteen thousand dollars; and we hereby give to the holder thereof full power and authority to sell or collect at our expense all or any part or portion thereof at any place either in the city of Nashville, or elsewhere, at public or private sale, at his option, on the non-performance of the above promise, and at any time thereafter, and without advertising the same, or otherwise giving to us any notice, in case of public sale, the holder may purchase without being liable to account for more than the net proceeds of such sale.

A. E. ALDEN, *Mayor.*

W. MILLS, *Recorder.*

Said Allen, at the same time, handed to witness corporation checks for $16,000, of which the $1,000 checks sued on, payable to Julius Sax or bearer, was one, and the others were in every respect similar, only differing in numbers. Witness received said checks of said Allen on Feb'y 2nd, and the day following presented them to Thomas G.
45 Magrane, the treasurer, for his endorsement. Said Magrane endorsed the said checks accordingly, as shown on the back of the one in suit. Witness sold the checks sued on to McCrory, the agent of plaintiff, on the 9th of Feb'y, 1869, six days after its endorsement for $800 $\frac{80}{100}$, the 80 c. being for interest accrued thereon.

The charter and ordinances and bye-laws of the corporation of Nashville, and printed by order of the city council, were put in evidence, and any part of the said charter and ordinances may be used as evidence in the Supreme Court of the United States, from the printed statutes of the State, or printed volume of the ordinances of the corporation, without being copied into this record.

Defendant offered evidence tending to prove that the practice of the collector of re-issuing checks was unknown to a portion of the members of the council. And defendant further read in evidence the 10th
46 section of an amendment to its corporate charter, passed by the legislature of Tennessee March 16, 1868, as follows:

SEC. 10. That the city council shall, within two months from the election of the assessor, and before he shall, with his assistants, have completed the valuation, determine the amount of taxes required and necessary to be raised for the ensuing year, including the amount required for the payment of the coupons and interest on the bonds and funded debt of the city, which shall be kept separate and distinct on the assessment roll and book, and payable only in legal currency, for which no checks or orders of the city will be received or collected; and the amount necessary to be raised for a sinking fund, for the final redemption and payment of such bonds and funded debt, which the city council may also determine, shall be paid in the same manner, and also the amount necessary to be raised for the support of the
47 public schools, which they in like manner may determine, shall be so payble; and they shall also determine the amount necessary for ordinary revenue and all the appropriations for the year, and they shall determine the rates per cent. requisite for each division, to raise such separate amounts, and any diversion of the first division, or after they determine for legal currency of either of the two next divisions, shall be unlawful, and subject every member of the city council voting for, or otherwise aiding the same, to be individually liable therefor; and the several divisions or rates in legal currency, and otherwise shall be kept, collected, accounted for, and paid over to the treasurer in such divisions as separate funds by the assessor and collector.

Defendant further put in evidence the following provisions of its published bye-laws, proving the same to have been in force from
48 1857 to the present time.

CHAPTER 54, SEC. 4. That the recorder shall keep a well-bound book, in which shall be fairly noted down all licences by him granted, to whom granted, and for what purpose, specifying the dates of such licences, with the several sums by him received therefor annexed; and he shall keep a well-bound book, in which he shall open and keep a fair account of the settlements made with the treasurer, collector of the revenue, and other officers, and persons with whom the corporation may have moneyed transactions. He shall attend all meetings of the city council, and keep a faithful record of their proceedings, and shall perform such other services as are or may be required of him by the laws and ordinances of this corporation.

CHAPTER 23, SEC. 8. That the mayor shall, at the commencement of the municipal year, appoint a standing committee of three, who shall be known as the committee of improvements and expenditures.

49 SEC. 9. That all propositions having any relation to improvement, or the expenditure of money, or the incurring of any liability, shall be referred to said committee, whose duty it shall be to enquire into the character of the improvement, proposed expenditure, or liability, and the immediate necessity for the same, and make their written report to the city council, giving the result of their investigation and their reasons for approval or rejection of said propositions.

SEC. 10. That no person, whether a member of the city council or officer of the corporation, shall order, contract, or do anything, whereby an expenditure of money is the consequence, or liability is to be incurred,

authority; and that the Sax check was one so issued. The check sued on by plaintiff payable to Julius Sax or bearer, and the other payable to A. J. Duncan or bearer, each for $1,000, are of those so ordered by Silas F. Allen, who was chairman of the finance committee. Witness knew both Sax & Duncan.

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47 public schools, which they in like manner may determine, shall be so payble; and they shall also determine the amount necessary for ordinary revenue and all the appropriations for the year, and they shall determine the rates per cent. requisite for each division, to raise such separate amounts, and any diversion of the first division, or after they determine for legal currency of either of the two next divisions, shall be unlawful, and subject every member of the city council voting for, or otherwise aiding the same, to be individually liable therefor; and the several divisions or rates in legal currency, and otherwise shall be kept, collected, accounted for, and paid over to the treasurer in such divisions as separate funds by the assessor and collector.

Defendant further put in evidence the following provisions of its published bye-laws, proving the same to have been in force from
48 1857 to the present time.

CHAPTER 54, SEC. 4. That the recorder shall keep a well-bound book, in which shall be fairly noted down all licences by him granted, to whom granted, and for what purpose, specifying the dates of such licences, with the several sums by him received therefor annexed; and he shall keep a well-bound book, in which he shall open and keep a fair account of the settlements made with the treasurer, collector of the revenue, and other officers, and persons with whom the corporation may have moneyed transactions. He shall attend all meetings of the city council, and keep a faithful record of their proceedings, and shall perform such other services as are or may be required of him by the laws and ordinances of this corporation.

CHAPTER 23, SEC. 8. That the mayor shall, at the commencement of the municipal year, appoint a standing committee of three, who shall be known as the committee of improvements and expenditures.

49 SEC. 9. That all propositions having any relation to improvement, or the expenditure of money, or the incurring of any liability, shall be referred to said committee, whose duty it shall be to enquire into the character of the improvement, proposed expenditure, or liability, and the immediate necessity for the same, and make their written report to the city council, giving the result of their investigation and their reasons for approval or rejection of said propositions.

SEC. 10. That no person, whether a member of the city council or officer of the corporation, shall order, contract, or do anything, whereby an expenditure of money is the consequence, or liability is to be incurred,

unless authorized by existing laws, or by order of the city council. And the recorder is hereby required to issue no check upon the treasurer, in his official character, for money, unless by authority of the city council, or in pursuance of existing laws of the corporation: *Provided*, That the water-works committee shall not be prevented, in case of emergency, from making all necessary expenditures to keep the
50 water-works in good repair and condition, and in active operation.

SEC. 12. All checks issued by the recorder shall be countersigned by the mayor, and he shall be required to keep accurate accounts of the checks issued, the amount of each, and to whom issued. The allowance of accounts and appropriations to pay the same shall be made at the first regular meeting of each month of the two boards respectively.

And the defendant further put in evidence the following section of its charter passed by the legislature of Tennessee, in 1848, and offered evidence to show the publication of the above bye-laws, under the provisions of said section of its charter.

ACT OF JAN. 31ST, 1848. SEC. 10. There shall be prepared and published, by the city council, a digest of all the ordinances and resolutions of a public nature now in force within six months after the passage of this act, and a like digest once in every three years thereafter.

And defendant further offered evidence to prove that it had
51 been the uniform usage of the corporate authorities to issue no checks other than such as were issued by order of council, or under the provisions of existing laws, until some time after the said Alden became mayor, and the said Mills became recorder, and until within a few months before the purchase of the checks by plaintiff. But the court refused to admit evidence tending to prove this point, to which ruling of the court defendant, by attorney, then and there excepted.

Defendant further introduced proof tending to show that McCrory, the agent of plaintiff at the time he purchased the 18 checks of Jamison, had notice that the same had been received by the tax-collector, and re-issued by him to said Jamison, the secretary and treasurer of the board of education.

Defendant further introduced evidence tending to prove that the city council had no knowledge of the manner of making checks, as detailed by the witness Mills, on the mere order of the chairman of the finance
52 committee, and their hypothecation and sale for money; and also evidence tending to prove that some of the council had no notice or knowledge of the re-issuance of checks by the collector. And on these points defendant put in evidence all the semi-monthly reports of said collector to the council and the records of the proceedings of the two boards of the city council, and examined several aldermen and councilmen, and also examined Tho's J. Haile, the present recorder, who had examined the proceedings of said board, with a view to find any evidence of such knowledge having been brought home to the council, during the proper period without finding it.

Upon the close of the testimony, defendant's counsel requested the court to charge the jury as follows:

1st. The defendant requested the court to charge the jury that the corporation of Nashville had no power, under its charter, to borrow
53 money, and that, therefore, any checks issued for this purpose, eitheir by hypothecation or by sale in the market, for what they would bring, would be ultra vires of the corporate powers and void. Refused by the court.

2nd. The court refusing so to charge, the defendant then requested the court to charge the jury that the corporation could only exercise the power of borrowing money by ordinance of the city council, for some specific purpose, within its chartered powers; and that any checks, or other instruments made for the purpose of borrowing money, without such ordinance, either by hypothecation or sale in the market, by the officers of the corporation, would be void. Refused.

3rd. The defendant also requested the court to charge the jury that it was the duty of every person taking a corporation check from any of its officers, or purchasing such checks, to take notice of the powers of the officers of the corporation as defined by the charter and ordinances, and to examine and ascertain whether the check was authorized by ordinance. Refused.

54 4th. The defendant also requested the court to charge the jury that the city council of Nashville, as the legislative department of the corporation, could not delegate its powers under the charter to any one or more of its officers; that the contracting of liabilities for corporate purposes, and the allowance of claims against the corporation, and the appropriations of money for the payment of liabilities and claims, were legislative functions that could not be delegated. Refused.

5th. The defendant also requested the court to charge the jury that the corporation of Nashville had no power, under its charter, to issue negotiable securities, with all the attributes of negotiability; and that any negotiable securities issued by it would be subject to impeachment in whosoever hands they might come. Refused.

6th. The defendant also requested the court to charge the jury that the corporation of Nashville could not issue negotiable secureties at all; that the instruments sued on were only the mode addopted by the corporation of paying out money in the treasury, and could only

55 be sued on by, or in the name of, the original party to whom issued, and that, if the jury found that the plaintiff was not the person to whom the checks sued on were originally issued, and made payable, he could not recover on them. Refused.

7th. The defendant further requested the court to charge the jury that although the recorder of the corporation of Nashville, or the recorder and mayor, or either, or both of these officers, and the chairman of the finance committee can lawfully issue warrants or checks on the treasury for some purposes, yet an inquiry can be made, in any case, into the purpose for which a warrant or check was issued; and that if the jury should find that the checks in controversy were not authorized by corporation ordinance, the plaintiff could not recover on them. Refused.

8th. That warrants or checks drawn by one officer of a municipal corporation on another, for the purpose of drawing money from the corporation treasury, are not, in their nature, negotiable without ex-

56 press authority from the legislative department of the city government; and that the checks in controversy would not be negotiable unless the jury are satisfied that they were expressly authorized to be made so by the city council. Refused.

9th. The counsel for defendant requested the court to charge the jury that if it appears to them by the proof in the cause that the check or draft for $1,000, issued and payable to Julius Sax, dated 2nd of Feb'y, 1869, was issued to him, along with other checks, as collateral security, for a note of that date, made by the defendant, for $12.000, payable to said Sax, and due at four months after date, with power on his part to sell said checks on default of payment of said note, and without other

authority to sell the same, and if it appears further that he did, in fact, sell said check, (the same having been first presented to the treasurer for payment, and payment having been refused,) on the 9th of Feb'y thereafter, to the plaintiff, and before said note was due, and in violation of his agreement, that he thereby communicated no title to the plaintiff; and that the plaintiff is not entitled to recover thereon in this action.

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10th. The counsel for defendant request' the court to charge the jury that as to the other eighteen checks or drafts, if it shall appear to the jury that they were received by the collector of the defendant, an officer of the corporation, in payment of taxes, as he was authorized to do, that then they were as papers binding upon the corporation functus officio; and if it shall appear that the same checks were re-issued or passed by said collector to a third party without an order or ordinance of the corporation to that effect, or without a usage of said collector to that effect, recognized by or known to said corporation that, in the hands of a purchaser from such third party, these checks would form no valid claim against said corporation, and the plaintiff would not be entitled to recover upon the same.

58

This was given with the explanation that the plaintiff could recover money actually paid, and which the corporation used.

12th. Counsel for defendant ask' the court to charge that, if it appear from the proof that any of the checks sued on had been once received by the revenue collector of the defendant in payment of taxes, they then, as papers binding upon the defendant, were functus officio, and if the plaintiff bought such checks, with notice after they had been presented for payment to the city treasurer, and after they had been paid in to the city revenue collector, they cannot be made the foundation of an action against the defendant, and the name of the city treasurer written on the back of the several checks, with the date underwritten, is sufficient notice to plaintiff of the character of the paper; and further that the treasurer of the board of education of the city of Nashville, having no general authority by law to borrow money, evidence of the payment or passing of money to him by the plaintiff, will not support this action on the money counts unless a special authority to borrow such money by him is proved.

59

This request was given but explained, as hereafter stated, to be inapplicable to this case; if the jury believe a usage had been proved to issue the paper a second time, and that the acts of the treasurer had been sanctioned by the corporation in the manner hereafter stated in the charge of the court.

And to the action of the court, in each case, in refusing to charge as above requested, the defendant then and there separately excepted.

His honor then charged the jury, (with other things not specially excepted to,) as follows:

The charter of the city of Nashville authorizes it to issue promissory notes and other secureties for lawful debts, and the instruments given in evidence, nineteen in number, if signed by the proper officers or agents, and given for a good consideration, are legal, and are obligatory upon the defendant. And to this instruction of the court the defendant, by attorney, then and there excepted.

60

It is in evidence that, by long-continued usage, such instruments have been signed and issued by the officers who signed and issued these. If you credit this testimony, which is uncontradicted—and, so far as the conduct of this trial is concerned, unquestioned—it is sufficient to authorize you to find that the mayor, and recorder, and treasurer were the

agents of the corporation for this purpose, competent to bind it by these instruments. A corporation, unless restricted as to manner by its charter, may, by holding out to the public officers as clothed with certain powers, is bound by their acts within the scope of the functions so usually exercised. And to this instruction of the court the defendant, by attorney, then and there excepted.

61 It is objected that, although these instruments may be signed by proper officers, competent, under the charter, and the usage proved to sign and issue them in certain circumstances, it is said they have no right to do so unless the accounts for which they are given are allowed by the council. There is some evidence on this point, and more was offered by the defendant and rejected by the court, to show that such was the invariable usage of the corporation. We charge you that, no matter how universal may have been this usage, or what the construction of its ordinances in this regard, they are wholly immaterial. The purchasers of these instruments were authorized to presume such allowance had been made, and without proof that they knew it had been omitted, are as fully entitled to recover as though the records of the corporation contained a formal allowance of the accounts by the council. And to this instruction of the court to the jury defendant then and there excepted.

62 If it is the usage, as sworn to by the witness Jamison, to re-issue the securities by sale in the market, they will, when so sold, be obligatory upon the corporation. If they are, upon their face, overdue at the time of such sale, they will be, in law, payable on demand, and are not to be deemed dishonored, so as to let in defenses between the company and a subsequent holder of the paper, until after the lapse of a reasonable time after their re-issue for the making of such demand. And to this instruction of the court to the jury defendant, by attorney, then and there excepted.

The defendant has power, under its charter, to make the securities given in evidence. They are, in legal effect, promissory notes, and, as it is admitted, they are signed by the officers who have, for many years, performed that duty, they are, when duly issued, obligatory. And to this instruction by the court defendant, by attorney, then and there excepted.

63 If you believe the eighteen checks sold by Jamison were received by the collector for taxes for the support of the educational department, and that, with consent of mayor, alderman, and council, they were, according to common practice, handed over to the secretary, with authority, on his part, to dispose of them to procure means for the payment of teachers, and other expenses, and that he sold them, received the proceeds, and properly applied them, they are, by virtue of this re-issue and sale, valid obligations against the city. And to this instruction of the court defendant, by attorney, then and there excepted.

If you believe that this sale, and others of like character, were duly reported by Jamison to the board of education; that they appeared upon its books, and were reported by it to the proper officers of the corporation, and that these sales were repeatedly and publicly made during many months, and that there were no other funds for the support of the educational department than those so procured; and that

64 it was, during all this time, wholly supported in this way, these facts will authorize you to presume that such usage and action was known to, and approved by, the corporation, although there may

have been members of the board who were ignorant of it, and although no formal official action was ever taken by them in regard to it. It is the duty of governing bodies in all municipal corporations, to know how a great department under its care is supplied with means; to know the facts appear upon its books and in its reports, and the public has a right to presume they so know them. In coming to a conclusion upon the subject, you will take into consideration the character of the reports; the time of making them; the opportunity to examine them under the city government; and also the direct proof of actual knowledge given by the witnesses. And to this instruction of the court defendant, by attorney, then and there excepted.

If you believe it was the common usage of *of* the finance committee, known to the corporation, to pledge its checks in security for its notes, and that the $1,000 check was so pledged to Sax, in conformity with the usage, and that he, within six days from its date, sold it, before the maturity of the note to secure which it was pledged, and the same was bought without notice of a premature sale, or of any irregularity in its issue, then the plaintiff is entitled to recover for the face of the check and interest. To which instruction of the court the defendant, by attorney, then and there excepted. Should you find all these facts adversely to the plaintiff, you will find a verdict for such sum only as you believe the corporation has received and appropriated to the proper uses of the city, with interest. To which instruction of the court defendant, by attorney, then and there excepted.

H. H. EMMONS,
Circuit Judge.

On the 13th day of November, 1871, an appeal-bond was filed, which is as follows:

THE MAYOR & CITY COUNCIL OF NASHVILLE pl'ff in error,
vs.
W'M RAY, DEF'T IN ERROR.

Know all men by these presents that we, The Mayor & City Council of Nashville, as principal, and John Lellyett, K. J. Morris, D. F. Carter, A. C. Carter, Charles Kircher, James M. Reed, A. J. Smith, Geo. W. Smith, W'm Litterer, W'm H. Perry, and W. H. Wilkinson, as sureties, are held and firmly bound unto William Ray, in the penal sum of nineteen thousand seven hundred and fifty-three $\frac{70}{100}$ dollars, to be paid to the said William Ray, his heirs and personal representatives, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, and legal representatives, firmly by these presents, sealed with our seals and dated this 13th day of November, in the year of our Lord eighteen hundred and seventy-one.

The condition of the above obligation is such, that whereas the above bound Mayor and City Council of Nashville have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled cause by the honorable circuit court of the United States for the middle district of Tennessee, sitting at Nashville, in said district, for $9,876 $\frac{44}{100}$ at the October term of said court, 1871:

Now, therefore, if the above-bound mayor and city council of Nashville shall prosecute their said writ of error to effect, or answer all dam-

ages and costs if they fail to make good their plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

THE MAYOR & CITY COUNCIL OF NASHVILLE,
By JOHN LELLYETT, *Attorney.*

JOHN LELLYETT. [SEAL.]
K. J. MORRIS. [SEAL.]
D. F. CARTER. [SEAL.]
68 GEO. W. SMITH. [SEAL.]
A. C. CARTER. [SEAL.]
JAMES M. REED. [SEAL.]
A. J. SMITH. [SEAL.]
W'M LITTERER. [SEAL.]
W'M H. PERRY. [SEAL.]
CHARLES KIRCHER. [SEAL.]
W. H. WILKINSON. [SEAL.]

Approved November 13th, 1871.

CONNALLY F. TRIGG,
U. S. District Judge.

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

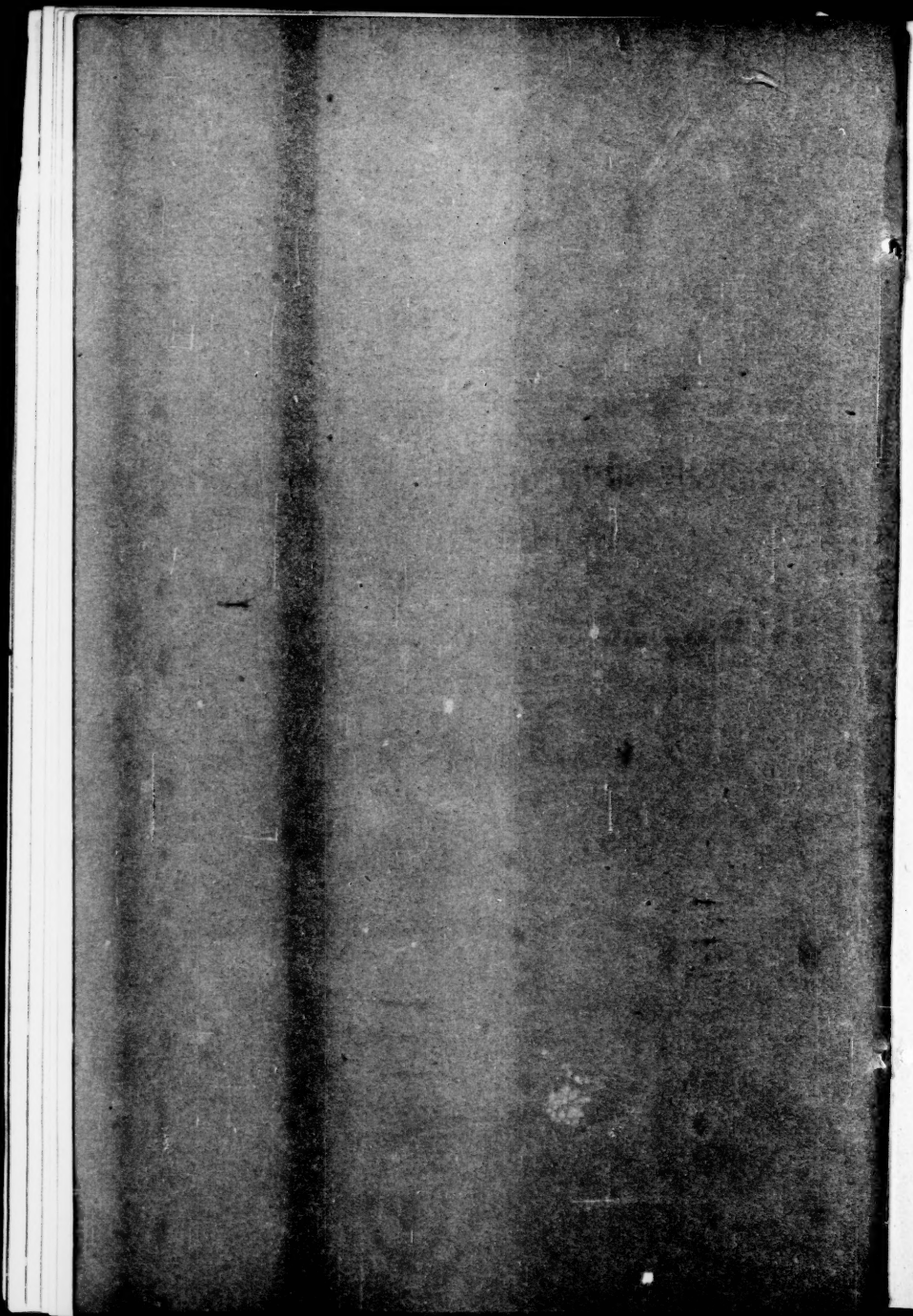
I, Edward R. Campbell, clerk of the circuit court of the United States for the district aforesaid, do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings had in said court in the cause of William Ray, plaintiff, against The Mayor and
69 City Council of Nashville, defendants, as the same appears of record and on file in my office.

In testimony whereof I have hereto set my hand and affixed the seal of our said court at my office in the city of Nashville, on this the 4th day of January, 1872, and of the Independence of the United States the 96th year.

[SEAL.]

E. R. CAMPBELL,
Clerk of the Circuit Court of the United States for the Middle District of Tennessee.

(Indorsement on cover:) No. 647. The Mayor and City Council of Nashville, plaintiff in error, v. William Ray. M. Tennessee. C. C. U. S. Filed 22d April, 1872.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1873.

MAYOR AND CITY COUNCIL OF NASHVILLE,
PLAINTIFF IN ERROR,

vs.

WILLIAM RAY.

ARGUMENT OF W. F. & H. COOPER,
OF COUNSEL FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1873.

MAYOR AND CITY COUNCIL OF NASHVILLE,
PLAINTIFF IN ERROR,
vs.
WILLIAM RAY.

ARGUMENT OF W. F. & H. COOPER,

OF COUNSEL FOR PLAINTIFF IN ERROR.

This was an action of assumpsit brought by William Ray against the Mayor and City Council of Nashville, based upon nineteen checks, or warrants, upon the Treasury of the Corporation of Nashville, of which the following may be taken as a specimen:

$1,000. NASHVILLE, Dec. 23, 1868.

Treasurer Corporation of Nashville, pay to A. J. Duncan, or bearer, one thousand dollars, on account of Water Works.

W. MILLS, Recorder.

A. E. ALDEN, Mayor.

(Endorsed) THOS. G. MAGRANE, Treasurer, Dec. 26, 1868.

These warrants are all drawn by the Recorder, countersigned by the Mayor, and endorsed by the Treasurer of the Corporation. The proof shows that the endorsement by the Treasurer was for the purpose of fixing the date of presentment for payment, with a view to the running of interest from that date.

Of these nineteen checks, eighteen were proven by the plaintiff

himself (Rec. p. 37,) to have been received by the Tax Collector of the city from tax payers, in payment of taxes due the city, and afterwards, and about the 28th of January, 1869, paid over by said Collector to the Secretary and Treasurer of the Board of Education of said corporation, and sold by the latter to J. C. McCrory, as the agent of the plaintiff to buy the same, at the rate of eighty cents in the dollar, and that the proceeds of the sale of said checks were by him paid to female teachers employed in the public schools of defendant. The defendant proved (Rec. p. 51) that McCrory, the agent of the plaintiff, had notice at the time of his purchase of these eighteen checks, that they had been received by the Tax Collector, and re-issued by him to the Secretary and Treasurer of the Board of Education. These checks all bear date, and were endorsed by the Treasurer before, and some of them, long before the first of January, 1869.

The plaintiff offered evidence tending to show (Rec. p. 36,) that at the time of the purchase of the checks sued on by him, and for *some five months next preceding* such purchase the taxes for the support of the public schools were collected in such checks, and paid over by the Tax Collector to the Secretary and Treasurer of the Board of Education; and that for the same time (*five months*) it had been the practice of said Secretary and Treasurer of the Board of Education, to sell such checks so paid over to him, and to use the proceeds of sale in the payment of teachers.

The defendant proved (Rec. p. 46) that the practice of the Collector of re-issuing checks, was unknown to a portion of the members of the City Council. And on this point, the defendant put in evidence, (Rec. p. 52) all the semi-monthly reports of said Collector to the City Council, and the records of the proceedings of the two Boards of the City Council, and examined several Aldermen and Councilmen, and also Thomas J. Haile, the present Recorder, who had examined the proceedings of said Board with a view to find any evidence of such knowledge having been brought home to the City Council, during the period, without finding any such evidence.

The plaintiff introduced parol evidence, tending to prove that members of the City Council, the Mayor and other city officers, in the performance of their official duties, were informed of the practice pursued by the Collector as above, (for five months,) to re-issue

the checks which he had received in payment of taxes, by paying a portion of them over to the Board of Education. (Rec. p. 41.) To the introduction of this evidence, the defendant objected, on the ground that such notice to the City Council and officers of a Municipal Corporation should be shown by its records, and documents on file in its archives, and that no ground had been laid for the introduction of secondary evidence on this point, as by notice to defendant to produce books and papers, and their non-production, or other lawful grounds. But the Court overruled the objection, and admitted the parol evidence. To which rulings defendant excepted.

The defendant read in evidence the 10th section of the Act of the General Assembly of the State of Tennessee, of the 16th of March, 1868. (Rec. p. 46.) This section enacts that the City Council shall, within a given time, determine the amount of taxes required, and necessary to be raised for the payment of the funded debt, for a sinking fund, and for the support of public schools, each of which divisions shall be kept separate and distinct on the assessment roll and book, and shall be "*payable only in legal currency, for which no checks or orders of the city will be received or collected.*" The section further provides that any diversion of this division of the taxes, after the City Council determine for legal currency, "shall be unlawful, and subject every member of the City Council voting for, or otherwise aiding the same, to be individually liable therefor; and the several divisions or rates in legal currency, and otherwise, shall be kept, collected, accounted for, and paid over to the Treasurer in such divisions, *as separate funds*, by the Assessor and Collector."

This was the substance of the case so far as it related to, and was based upon, eighteen out of the nineteen checks sued on, as a class.

As to one of these checks, No. 3,521, for $1,000, the defendant offered to prove (Rec. p. 40) that the same was not allowed by the City Council, and was one of a large number of similar checks issued clandestinely upon a corrupt contract with a member of the City Council, who acted in the matter without authority, and without any knowledge of the Council, and that said check was issued upon no other authority than the direction of a member of the Council. But the Court refused to allow such evidence to be introduced, to which ruling the defendant excepted.

The remaining check of the nineteen sued on, is No. 4,250, for $1,000, (Rec. p. 18) payable to Julius Sax, or bearer, and, therefore designated in the Record as the Sax check. This check bears date the 2nd of February, 1869, and is endorsed by the Treasurer on the 3rd of February, 1869, and was bought, as the plaintiff himself proves, by his agent McCrory, for him, *from Julius Sax, on the 9th of February*, 1869, (Rec. p. 38).

Sax himself was introduced as a witness by the plaintiff below, and proved (Rec. p. 43) that on the 2d of February, 1869, he loaned to the defendant, on four months time, $12,000, one half of which loan he paid in Corporation checks of like character as some of those sued on in this action, and the other half in cash, *less the discount on the entire loan.* This negotiation was made with Silas F. Allen, who was chairman of the Finance Committee of the City Council, and who professed to act in the matter for defendant. Allen gave the witness a note for said loan in words and figures following:

$12,000. NASHVILLE, February 2, 1869.

Four months after date, we promise to pay Julius Sax, or order, twelve thousand dollars, for value received, having deposited or pledged as collateral security for the payment of this note, Nashville Corporation checks Nos. 4239 to 4254 inclusive, amounting to sixteen thousand dollars; *and we hereby give to the holder thereof full power and authority to sell or collect, at our expense, all or any part or portion thereof, at any place, either in the city of Nashville, or elsewhere, at public or private sale, at his option, on the non-performance of the above promise, and at any time thereafter, and without advertising the same, or otherwise giving to us any notice. In case of public sale, the holder may purchase without being liable to account for more than the net proceeds of such sale.*

A. E. ALDEN, Mayor.

W. MILLS, Recorder.

Said Allen, at the same time, handed to witness Corporation checks for $16,000, of which the $1,000 check sued on, payable to Julius Sax, or bearer, was one, and the others were in every respect similar, only differing in numbers. Witness received said checks of said Allen on February 2d, and presented them, on the following day, to the Treasurer for his endorsement, and they were endorsed by him accordingly on that day as shown by the endorsement on the check in suit. Witness sold the checks sued on to McCrory, the agent of

plaintiff, on the 9th of February, 1869, six days after its endorsement, for $800.80, the 80 cents being for interest accrued thereon.

The plaintiff introduced Wm. Mills as a witness (Rec. pages 41 and 42,) who proved that he was Recorder of the Corporation of Nashville from October 1867 to September 1869, and explained the practice pursued by himself and the Mayor Alden, in the issuance of checks. That in addition to checks issued by order of the City Council in the allowance of accounts, *checks were frequently issued by order of the Chairman of the Finance Committee without other authority; and that the Sax check was so issued*, as was also the A. J. Duncan check, one of the eighteen checks before mentioned.

The plaintiff then offered parol evidence tending to prove that the practice of issuing checks in the manner described by the witness Mills, and selling or hypothecating them for money, was known to the City Council, through its official action, and had been pursued without objection for several months. This evidence was objected to by the defendant, but the objection was overruled, and the evidence admitted, to which the defendant excepted. (Rec. p. 42.)

On the other hand, the defendant introduced evidence to prove that the City Council had no knowledge of the manner of making checks, as detailed by Mills, on the mere order of the Chairman of the Finance Committee, and their hypothecation and sale for money. (Rec. p. 51.)

The defendant offered to prove by Mills, who was the Recorder, and had, as such, kept the record of the proceedings of the City Council, that it was his uniform practice to keep a faithful and complete record of all the proceedings of the defendant's Boards of the City Council; that said record showed in each month what accounts were allowed by the Council; and to show by said witness and said record that a number of said checks were actually issued upon accounts allowed by the City Council; that others of said checks were issued in pursuance of city ordinances; but that the larger part of them (including the Sax and Duncan checks) were not allowed by the City Council, nor issued in pursuance of any city ordinance, and that no evidence could be found in said records of said latter checks being issued for any consideration, or by any authority whatever. But the Court refused to admit said evidence, and the ruling was excepted to.

The charter, ordinances and by-laws of the city were put in evidence, and it was agreed they might be read from the printed volumes.

The defendant put in evidence certain provisions of its ordinances and by-laws, proving the same to have been in force from 1857 to the present time. (Rec. p. 48.)

Chapter 54, § 4, prescribing the duties of Recorder, and, among other things: "He shall attend all meetings of the City Council, and keep a faithful record of their proceedings," &c.

Chap. 23, § 8. "That the Mayor shall, at the commencement of the municipal year, appoint a Standing Committee of three, who shall be known as the Committee on Improvements and Expenditures."

Sect. 9. "That all propositions having any relation to improvements, or the expenditure of money, or the incurring of any liability, shall be referred to said Committee, whose duty it shall be to enquire," &c., and "make their written report," &c.

Sect. 10. "That no person, *whether a member of the City Council or officer of the Corporation*, shall order, contract, or do anything, whereby an expenditure of money is the consequence, or liability is to be incurred, unless authorized by existing laws, *or by order of the City Council. And the Recorder is hereby required to issue no check upon the Treasurer*, in his official character, for money, *unless by authority of the City Council*, or in pursuance of existing laws of the Corporation: *Provided*, that the Water Works Committee shall not be prevented, in case of emergency, from making all necessary expenditures to keep the Water Works in good repair and condition, and in active operation."

Sect. 12. "All checks issued by the Recorder shall be countersigned by the Mayor, and he shall be required to keep accurate accounts of the checks issued, the amount of each, and to whom issued. The allowance of accounts and appropriations to pay the same shall be made at the first regular meeting of each month of the two Boards respectively."

The defendant further offered evidence to prove that it had been the uniform usage of the corporate authorities to issue no checks other than such as were issued by order of the City Council, or under the provisions of existing laws, until some time after the said Alden became Mayor, and the said Mills became Recorder, *and until within a few months before the purchase of the checks by plaintiff*. But the Court refused to admit the evidence, to which the defendant excepted. (Rec. p. 51.)

I have thus collated the evidence, and arranged it with a view to show its bearing upon the checks sued on in this case. It is proper to add, however, that there was some evidence in relation to the general usage of the Corporation in regard to its checks, or warrants on the Treasury, not, perhaps, material except as to the Sax check, and, it may be, the Duncan check, or such other of the eighteen checks sold by the Secretary and Treasurer of the School Board as were issued without any city ordinance, or other authority whatever, so far as the records show.

The evidence thus referred to is as follows: Plaintiff introduced evidence (Rec. p. 35) tending to show, that for many years the custom of defendant had been to issue checks, in form the same, or similar to those sued on, *in payment of debts, or to draw money from the city treasury;* and that it had also been the custom for many years, when the Treasurer failed to pay such checks on their first presentation, for him to write his name on the back of such checks, with the date of such presentation, and afterwards in the payment of such checks so endorsed to allow interest from the date so written thereon, and that it was usual to present such checks for indorsement to draw interest, when it was known that there were no funds for their payment. Also evidence tending to prove that for many years it had been the well-known custom of the proper collecting officers of the defendant to receive such checks for taxes and other dues of said Corporation. And also evidence to show that at the time the checks sued on were made, and at the time they were bought by plaintiff, the defendant was largely involved in debt and financial embarrassment, and that many such checks were outstanding unpaid, and were commonly bought and sold in the market, and that nearly all of the taxes of the Corporation were paid to the Collector in such checks.

In the course of the plaintiff's examination of his witness Mills, the witness stated that all of the checks sued on were made in the usual course of business of the defendant, and issued for Corporation purposes, which evidence was objected to by the defendant, on the ground that the best evidence on this point would appear on the proper records of the Corporation, which *were then and there produced for the inspection of the witness and the Court.* But the Court overruled the objection, and admitted the evidence, to which ruling the defendant excepted. (Rec. p. 38.)

And it was then that the defendant, in the cross-examination of this witness, offered to prove by him and the records, that he had kept a faithful record of the proceedings of the Boards of the City Council, that said record showed what amounts were allowed in each month, and that the larger part of the checks in suit were not allowed by said Council, nor issued in pursuance of any city ordinance, and that no evidence could be found in said records of said checks being issued for any consideration, or by any authority whatever. And which evidence was excluded by the Court as above stated.

It will be seen from the foregoing statement that all of the checks sued on had been presented to the City Treasurer for payment before they were sold to the plaintiff, many of them long before, and, as evidence of the fact and in order that the checks might carry interest, were endorsed by the Treasurer with the date of presentation added.

It will also be noticed that the checks sued on may be divided into two classes:

1st. All but one had been actually paid to the City Tax Collector by tax-payers in the payment of taxes, and had been by the *Tax Collector* delivered to the Secretary and Treasurer of the Board of Education, and afterwards sold by him to the plaintiff *with knowledge on his part*, through his agent, of the facts.

2d. The remaining check, known as the Sax check, had been, by the Chairman of the Finance Committee, and without other authority, hypothecated, with many others, to secure a note purporting to be executed by the city for borrowed money, upon a written contract, embodied in the note, authorizing a sale of the checks at the maturity of the note if unpaid, and said check, in violation of this contract, had been sold by Sax to the plaintiff, long before the maturity of the note, at a discount of 20 per cent.

It will be noticed, too, that this last check, and the "larger part" of the other eighteen checks, (Rec. p. 39,) were not allowed by the City Council, *nor issued in pursuance* of any city ordinance, "*and that no evidence could be found in the city records of said checks being issued for any consideration, or by any authority whatever.*"

One of these checks, moreover, (Rec. p. 40,) the defendant offered to prove, was issued clandestinely upon a corrupt contract with a

member of the City Council, who acted in the matter without authority, and without any knowledge of the City Council, and upon no other authority than the direction of a member of the City Council. But the evidence was excluded by the Court, and the defendant excepted.

Upon the character of these checks thus detailed, the defendant resisted the plaintiff's recovery, upon grounds which may be stated analytically thus:

1st. The defendant, as a Municipal Corporation, could not bind itself by checks upon its Treasury, either for work, services, materials, or contract, under its charter and by-laws introduced in evidence, except by action of its legislative department, the City Council, to be evidenced by the record of its proceedings, which was required to be kept by the City Recorder, and *was kept* as proved by the Recorder himself, who was introduced as a witness by the plaintiff.

2d. That a Municipal Corporation is not authorized to borrow money unless the authority is conferred by the charter, and that the defendant's charter contains no such authority.

3d. That if, by implication, the charter of the defendant should be held to authorize the borrowing of money, it can only be for some specific object, or in the exercise of some express power granted, *and upon the action of its legislative department by ordinance.*

4th. That such a power would not authorize the Corporation, *even by express ordinance,* to borrow money upon the *hypothecation* of checks on its Treasury in the mode adopted in the transaction with Sax.

5th. And assuredly, the defendant's officers could not, *without express authority from the City Council by ordinance,* borrow money upon such hypothecation so as to bind the city.

6th. That Municipal Corporations have no implied power to issue negotiable securities of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money, or funding a pre-existing debt.

7th. That if Municipal Corporations have such implied powers for any purpose, such powers can only be exercised by the legislative department of the city government by public action, to be evidenced

of record, and cannot be exercised by its officers without such legislative action.

8th. That checks or warrants drawn by one officer of a Municipal Corporation upon another, in a particular mode authorized by the charter, by-laws, ordinances, or usage, as a mode of settling the liabilities of such Corporation, and drawing money from its Treasury, are not clothed with all the attributes of negotiability so as to be unimpeachable in the hands of *bona fide* holders.

9th. That the checks in controversy were not clothed with such attributes of negotiability.

10th. That they were, moreover, all past due as soon as presented to the Treasurer for payment, and endorsed by him, as evidence that there was no money in the Treasury to pay them.

11th. That the eighteen checks sued on which had been taken up by the Tax Collector, were *functus officio*, and could not again be put in circulation so as to be binding on the Corporation, except upon new authority.

12th. That such checks were inoperative and void in whosesoever hands they might come, and certainly in the hands of the plaintiff who took them with knowledge of the facts.

13th. That the Sax check was also void in whosesoever hands it might come, and certainly in the hands of the plaintiff, who took it after it had been presented to the Treasurer for payment.

14th. That the Sax check, and all of the other eighteen checks which could be shown to have been issued without "*any consideration or by any authority whatever*," so far as the city records show, were also void in whosesoever hands they might come.

15th. That the check issued clandestinely, upon a corrupt contract with a member of the City Council who acted without authority, was also void in whosesoever hands it might come.

16th. That the plea of *non est factum* to all the checks sued on threw upon the plaintiff the burden of proof that they were executed by proper authority from the Corporation, either by producing the ordinances or resolutions of the legislative department of the city government, or by showing that they were issued under some authority vested in the officers signing them, by the charter or by-laws. That it was not sufficient merely to show that they were signed by the officers whose duty it was to sign and deliver checks or warrants on the Treasury which were duly authorized.

17th. That persons who deal with a Municipal Corporation, or in its checks or warrants on its Treasury, must take notice of what is contained in the law of its organization, and in its published ordinances and by-laws regulating the duties of its officers, and the power of its various departments.

18th. That a Municipal Corporation cannot be bound by the acts or knowledge of the individual members of its legislative department *in pais*, but only by their acts in their collective capacity as a legislature, *to be evidenced by the record of its proceedings.*

19th. And, consequently, that the effort to give force to the illegal acts of the Tax Collector and Secretary and Treasurer of the Board of Education, in the matter of the eighteen checks extinguished by being taken in for taxes, and to the illegal acts of the Chairman of the Finance Committee, and other officers of the Corporation, who issued checks without proper authority, by bringing home knowledge of these facts to the members of the City Council, was clearly error.

20th. That a Municipal Corporation cannot be held liable for money paid to an officer of such Corporation upon a void contract, and paid out by the officer even in satisfaction of a legal obligation of the city. The city could only be made responsible for such money by a conversion of it by some corporate act, and not by the unauthorized act of its officer.

From the line of defence thus indicated, it will be seen why the defendant excepted to the rulings of the Court upon the evidence as hereinbefore set out. It will also be seen why the defendant's counsel requested the Court to charge the jury, as they did in the twelve requests embodied in the bill of exceptions, and excepted to his refusal to charge as requested, and why they excepted to his actual charge as contained in the bill of exceptions. These requests, and the action of the Court thereon, and the charge to the jury upon the points excepted to, are as follows:

"Upon the close of the testimony, defendant's counsel requested the Court to charge the jury as follows:

"1st. The defendant requested the Court to charge the jury that the corporation of Nashville had no power, under its charter, to borrow money, and that, therefore, any checks issued for this purpose, either by hypothecation or by sale in the market, for what they

would bring, would be ultra vires of the corporate powers, and void. Refused by the Court.

"2nd. The Court refusing so to charge, the defendant then requested the Court to charge the jury that the Corporation could only exercise the power of borrowing money by ordinance of the City Council, for some specific purpose, within its chartered powers; and that any checks, or other instruments made for the purpose of borrowing money, without such ordinance, either by hypothecation or sale in the market, by the officers of the Corporation, would be void. Refused.

"3rd. The defendant also requested the Court to charge the jury that it was the duty of every person taking a Corporation check from any of its officers, or purchasing such checks, to take notice of the powers of the officers of the Corporation as defined by the charter and ordinances, and to examine and ascertain whether the check was authorized by ordinance. Refused.

"4th. The defendant also requested the Court to charge the jury that the City Council of Nashville, as the legislative department of the Corporation, could not delegate its powers under the charter to any one or more of its officers; that the contracting of liabilities for corporate purposes, and the allowance of claims against the Corporation, and the appropriations of money for the payment of liabilities and claims, were legislative functions that could not be delegated. Refused.

"5th. The defendant also requested the Court to charge the jury that the Corporation of Nashville had no power, under its charter, to issue negotiable securities, with all the attributes of negotiability; and that any negotiable securities issued by it would be subject to impeachment in whosesoever hands they might come. Refused.

"6th. The defendant also requested the Court to charge the jury that the Corporation of Nashville could not issue negotiable securities at all; that the instruments sued on were only the mode adopted by the Corporation of paying out money in the Treasury, and could only be sued on by, or in the name of, the original party to whom issued, and that, if the jury found that the plaintiff was not the person to whom the checks sued on were originally issued, and made payable, he could not recover on them. Refused.

"7th. The defendant further requested the Court to charge the jury that although the Recorder of the Corporation of Nashville, or the Recorder and Mayor, or either, or both of these officers, and the Chairman of the Finance Committee, can lawfully issue warrants or checks on the Treasury for some purposes, yet an inquiry can be made, in any case, into the purpose for which a warrant or check was issued; and that if the jury should find that the checks in controversy were not authorized by Corporation ordinance, the plaintiff could not recover on them. Refused.

"8th. That warrants or checks drawn by one officer of a Municipal Corporation on another, for the purpose of drawing money from the Corporation Treasury, are not, in their nature, negotiable, without express authority from the legislative department of the city government; and that the checks in controversy would not be negotiable unless the jury are satisfied that they were expressly authorized to be made so by the City Council. Refused.

"9th. The counsel for defendant requested the Court to charge the jury that if it appears to them by the proof in the cause that the check or draft for $1,000, issued and payable to Julius Sax, dated 2nd of February, 1869, was issued to him, along with other checks, as collateral security, for a note of that date, made by the defendant, for $12,000, payable to said Sax, and due at four months after date, with power on his part to sell said checks on default of payment of said note, and without other authority to sell the same, and if it appears further that he did, in fact, sell said check, (the same having been first presented to the Treasurer for payment, and payment having been refused,) on the 9th of February thereafter, to the plaintiff, and before said note was due, and in violation of his agreement, that he thereby communicated no title to the plaintiff; and that the plaintiff is not entitled to recover thereon in this action. Refused.

"10th. The counsel for defendant requested the Court to charge the jury that as to the other eighteen checks or drafts, if it shall appear to the jury that they were received by the Collector of the defendant, an officer of the Corporation, in payment of taxes, as he was authorized to do, that then they were as papers binding upon the Corporation *functus officio;* and if it shall appear that the same checks were re-issued or passed by said Collector to a third party without an order or ordinance of the Corporation to that effect, or without a usage of said Collector to that effect, recognized by or known to said Corporation, that, in the hands of a purchaser from such third party, these checks would form no valid claim against said Corporation, and the plaintiff would not be entitled to recover upon the same.

This was given with the explanation that the plaintiff could recover money actually paid, and which the Corporation used.

"12th. Counsel for defendant asked the Court to charge that, if it appear from the proof that any of the checks sued on had been once received by the Revenue Collector of the defendant, in payment of taxes, they then, as papers binding upon the defendant, were *functus officio*, and if the plaintiff bought such checks, with notice after they had been presented for payment to the City Treasurer, and after they had been paid in to the City Revenue Collector, they can not be made the foundation of an action against the defendant, and the name of the City Treasurer written on the back of the several

checks, with the date underwritten, is sufficient notice to plaintiff of the character of the paper; and further that the Treasurer of the Board of Education of the City of Nashville, having no general authority by law to borrow money, evidence of the payment or passing of money to him by the plaintiff, will not support this action on the money counts, unless a special authority to borrow such money by him is proved.

"This request was given, but explained, as hereafter stated, to be inapplicable to this case; if the jury believe a usage has been proved to issue the paper a second time, and that the acts of the Treasurer had been sanctioned by the Corporation in the manner hereafter stated in the charge of the Court.

"And to the action of the Court, in each case, in refusing to charge as above requested, the defendant then and there separately excepted.

"His Honor then charged the jury, (with other things not specially excepted to,) as follows:

"'The charter of the city of Nashville authorizes it to issue promissory notes and other securities for lawful debts, and the instruments given in evidence, nineteen in number, if signed by the proper officers or agents, and given for a good consideration, are legal, and are obligatory upon the defendant.' And to this instruction of the Court the defendant, by attorney, then and there excepted.

"'It is in evidence that, by long-continued usage, such instruments have been signed and issued by the officers who signed and issued these. If you credit this testimony, which is uncontradicted—and, so far as the conduct of this trial is concerned, unquestioned—it is sufficient to authorize you to find that the Mayor, and Recorder, and Treasurer, were the agents of the Corporation for this purpose, competent to bind it by these instruments. A Corporation, unless restricted as to manner by its charter, may, by holding out to the public officers as clothed with certain powers, be bound by their acts within the scope of the functions so usually exercised.' And to this instruction of the Court the defendant, by attorney, then and there excepted.

"'It is objected that, although these instruments may be signed by proper officers, competent, under the charter, and the usage proved to sign and issue them in certain circumstances, it is said they have no right to do so unless the accounts for which they are given are allowed by the Council. There is some evidence on this point, and more was offered by the defendant and rejected by the Court, to show that such was the invariable usage of the Corporation. We charge you that, no matter how universal may have been this usage, or what the construction of its ordinances in this regard, they are wholly immaterial. The purchasers of these instruments were authorized to presume such allowance had been made, and

without proof that it had been omitted, are as fully entitled to recover as though the records of the Corporation contained a formal allowance of the accounts by the Council.' And to this instruction of the Court to the jury, defendant then and there excepted.

"'If it is the usage, as sworn to by witness Jamison, to re-issue the securities by sale in the market, they will, when so sold, be obligatory upon the Corporation. If they are, upon their face, overdue at the time of such sale, they will be, in law, payable on demand, and are not to be deemed dishonored, so as to let in defences between the company and a subsequent holder of the paper, until after the lapse of a reasonable time after their re-issue for the making of such demand.' And to this instruction of the Court to the jury, defendant, by attorney, then and there excepted.

"'The defendant has power, under its charter, to make the securities given in evidence. They are, in legal effect, promissory notes, and, as it is admitted, they are signed by the officers who have, for many years, performed that duty, they are, when duly issued, obligatory.' And to this instruction by the Court defendant, by attorney, then and there excepted.

"'If you believe the eighteen checks sold by Jamison were received by the Collector for taxes for the support of the educational department, and that, with consent of Mayor, Aldermen and Council, they were, according to common practice, handed over to the Secretary, with authority, on his part, to dispose of them to procure means for the payment of teachers, and other expenses, and that he sold them, received the proceeds, and properly applied them, they are, by virtue of this re-issue and sale, valid obligations against the city.' And to this instruction of the Court defendant, by attorney, then and there excepted.

"'If you believe that this sale, and others of like character, were duly reported by Jamison to the Board of Education; that they appeared upon its books, and were reported by it to the proper officers of the Corporation, and that these sales were repeatedly and publicly made during many months, and that there were no other funds for the support of the educational department than those so procured, and that it was, during all this time, wholly supported in this way, these facts will authorize you to presume that such usage and action was known to, and approved by, the Corporation, although there may have been members of the Board who were ignorant of it, and although no formal official action was ever taken by them in regard to it. It is the duty of governing bodies in all Municipal Corporations, to know how a great department under its care is supplied with means; to know the facts appear upon its books and in its reports, and the public has a right to presume they so know them. In coming to a conclusion upon the subject, you will take into consideration the character of the reports; the time of making them; the opportunity to examine them under the city

government; and also the direct proof of actual knowledge given by the witnesses.' And to this instruction of the Court defendant, by attorney, then and there excepted.

"'If you believe it was the common usage of the Finance Committee, known to the Corporation, to pledge its checks in security for its notes, and that the $1,000 check was so pledged to Sax, in conformity with the usage, and that he, within six days from its date, sold it, before the maturity of the note to secure which it was pledged, and the same was bought without notice of a premature sale, or of any irregularity in its issue, then the plaintiff is entitled to recover for the face of the check and interest.' To which instruction of the Court the defendant, by attorney, then and there excepted.

"'Should you find all these facts adversely to the plaintiff, you will find a verdict for such sum only as you believe the Corporation has received and appropriated to the proper uses of the city, with interest.' To which instruction of the Court defendant, by attorney, then and there excepted.

"H. H. EMMONS,
Circuit Judge."

The rulings of the Court upon the evidence, his refusal to charge the jury as requested, and his general charge, so far as the same were excepted to by the defendant, were in direct antagonism to law as contended for by the defendant, and to the defenses set up as aforesaid. It becomes necessary, therefore, to discuss the questions of law thus raised, and this can be better done by considering, first, the particular powers of the Corporation of Nashville, and of its officers, as fixed by the charter, ordinances and by-laws; and, secondly, the general powers of Municipal Corporations, rather than by taking up each error complained of, and discussing it separately. The former mode, by ascertaining the general principles which govern municipal liabilities, will enable us readily to determine whether any error has been committed, and this, far more satisfactorily, than by endeavoring to point out, in the first instance, the specific error of each ruling. The latter course would tend to repetition and confusion; the former to clear and comprehensive generalization.

On the 31st of January, 1848, the General Assembly of the State of Tennessee passed an act entitled "An act to reduce the several acts incorporating the town of Nashville in one Act, and to amend the same." This Act starts out with incorporating the inhabitants

of the City of Nashville, as the same then extended and was laid out, and is, in itself, a complete charter of Municipal Incorporation, and includes all the provisions scattered through a number of previous Acts. It contains in its sixth section a full enumeration of the powers to be exercised for municipal purposes, all of which, it is expressly provided, are to be exercised "by ordinance." It concludes with this specific provision, section 11: "That all acts and parts of acts contrary to, and inconsistent with the provisions of this act, *or within the purview thereof*, are hereby repealed." This Act does not *expressly* confer upon the corporation created by it, the power to borrow money, or to issue bonds, notes, or other negotiable securities.

An effort was, however, made in the court below, and will probably be made in this Court, to derive the power to borrow money from certain previous Acts of the Legislature, which, it is contended, were not repealed by the repealing clause just cited. These are the fourth section of the Act of the 2nd of January, 1830, and the sixth section of the Act of November 27th, 1843.

The first of these sections reads thus:

"That it shall and may be lawful for the Mayor and Aldermen of the Town of Nashville, whenever they may deem it necessary, *by an ordinance of said Corporation*, and for the purpose of amending and improving the streets of said town, of paying any debt due and owing by said Corporation, or of erecting any necessary public building, to contract for a loan of any sum of money on such terms as they can borrow the same, and to pledge themselves in their corporate capacity, their successors in office, and faith of said corporation, for the payment of the principal and interest of any sum of money so borrowed, in the time and manner specified in the contract."

The second provision reads thus:

"That said corporation shall have full power to borrow money *on its bonds* for any object that its authorities may determine to be important to the promotion of its welfare, and that is not improper by existing laws; *Provided*, that the sum borrowed under the provisions of this act shall not exceed the sum of thirty thousand dollars, nor bear a higher rate of interest than six percentum per annum, and that nothing herein contained shall be so construed as conferring on said Corporation a power to issue paper that shall circulate as money."

If these provisions admitted of the construction now attempted to be put upon them, as exemplified in the issuance of the checks

in controversy, there would be the strongest possible reason for the repealing of such powers by the new Act of incorporation of 1848. In truth, however, these provisions are specific and limited, and require the exercise of the power granted in a particular manner. It is not pretended that there has been the exercise of such powers in any of the instruments now sued on. There has been no "contract" pledging the faith of the Corporation for any of the purposes enumerated under the one Act, nor any "bonds" not exceeding thirty thousand dollars under the other. Instead of such "contracts" and "bonds," for specific purposes or in the limited amount authorized, we have "checks" to the amount of millions, without "contract" or "ordinance" circulating by mere delivery like money. If these checks cannot be sustained under the general provisions of the charter of 1848, they cannot be sustained, we submit, under the specific provisions in question.

But can there be any doubt of the repeal of the Acts of 1830 and 1843 by the Act of 1848? The general rules which govern the repeal of statutes are, of course, well understood. Repeals by implication of general laws are not favored. There must be contrariety or repugnancy in the provisions, or some notice of the former act indicating an intention to repeal. But it is equally well understood that even a general statute is impliedly repealed by a subsequent one revising the whole subject matter of the first, without any negative or repealing words. (Sedgwick on Stat. Law 126, citing 10 Pick. 37; 11 Pick. 350.) *A fortiori,* the granting of a new charter of a municipal corporation complete in every essential particular, must, in its very nature, be a repeal of all previous acts of incorporation. The intention of the Legislature is, in such case, sufficiently evidenced by the scope of the Act. And this is in effect the decision of the Supreme Court of Tennessee, in the case of Daniel *vs.* Mayor and Aldermen of Memphis, 11 H. 582, where the repealing clause was in these words: "This act shall take effect immediately, and all laws and parts of laws contrary to, or conflicting with the provisions of this act, be, and the same are hereby repealed." This is not as strong as the 11th section of the act of 1848, which is, as we have already seen: "That all acts and parts of acts contrary to and inconsistent with the provisions of this act, or *within the purview thereof,* are hereby repealed." And it can scarcely be seriously urged as an objection to this view, that the

Legislature, by the act of the 28th January, 1852, in order to extend the corporate limits of Nashville, saw proper expressly to repeal a section of the act of 1830, by which certain persons, within the preferred extension, were supposed to have acquired a right not to be included in the city limits by protest within a given time—for a positive repeal of the act as an act of incorporation might not, in the eye of the law, have destroyed the right which had thus become vested in these citizens.

I think it very clear that the new charter of 1848 was a repeal of all previous acts of incorporation of the City of Nashville, and that the questions involved in this case must turn on the powers conferred by the charter. But, after all, as already suggested, it is perhaps not material whether this is so or not. The provisions sought to be kept alive are too special and restricted to change the aspect of the case. It is not pretended that any of the claims in controversy were created under either of these provisions. And the argument that the power to borrow being conceded for any purpose, is sufficient to sustain any mode of borrowing, although not such as the law itself provides, is of no greater weight than the argument which insists that the Corporation may, under the provisions of section 6 of the act of 1848, (already quoted), borrow money and issue its negotiable securities *ad libitum*. The two arguments are certainly on a par; for if the Corporation may borrow money to any extent, under the old charter, without 'contract' or 'bond' as prescribed, it may, it seems to me, equally borrow to any extent, "for the payment of the debt and expenses of the city."

In either case, the charter expressly provides that the money borrowed or the security issued, shall be "by ordinance."

The sixth section of the charter of 1848, expressly requires the Mayor and Aldermen to exercise the powers conferred upon them, "by ordinance." The fourth section of the act of the 2nd of January, 1830, expressly requires the Mayor and Aldermen to exercise the powers thereby granted to them, "by an ordinance of said Corporation." And the act of 1843 equally commences its enumeration of powers which the Corporation is authorized to exercise, by requiring the exercise to be by ordinances. And, without any provision on the subject, it is clear that the powers conferred upon a

municipal corporation can only be exercised by ordinance. Its officers can do nothing without law, and can neither contract a debt nor pay out money without legislative sanction.

By the earliest act of incorporation of Nashville, a Treasurer is appointed, and provision made for the permanent continuance of such an officer. (1784, 4.) By ordinance of the 28th of March, 1837, as will be seen in the compilation of the City Laws published in 1860, page 60, the time and mode of the election of this officer is prescribed. Section 2 of that ordinance enacts: "That the Treasurer shall receive all moneys collected for the use and benefit of the town, and shall disburse the same agreeably to *the laws and ordinances of this* Corporation; or to the resolutions of the Board of Mayor and Aldermen; he shall keep regular and correct accounts," etc. In the same compilation, at page 195, we find an ordinance in two chapters, entitled, "Provisions for the Protection of the Municipal Revenues." Chapter 1 is "An Act to restrain the improvident expenditure of the Municipal Revenues," and provides as follows:

"Sec. 1. That the Mayor shall, immediately after the passage of this act, appoint a standing committee of three, who shall be known as the 'Committee on Improvements and Expenditures;' and hereafter said committee shall be appointed as the other standing committees, at the commencement of the municipal year.

"Sec. 2. That all propositions having any relation to improvement or the expenditure of money, or the incurring of any liability, shall be referred to said committee, whose duty it shall be to inquire into the character of the improvement, proposed expenditure, or liability, and the immediate necessity for the same, *and make their written report to the Board*, giving the result of their investigation, and their reasons for approval or rejection of said propositions.

"Sec. 3. That no person, *whether a member of the Board or officer of the Corporation*, shall order, contract, or do anything whereby an expenditure of money is the consequence, or liability is to be incurred, unless authorized by existing laws, or by order of the Board; and the Recorder is hereby required to issue no check upon the Treasurer, in his official character, for money, *unless by authority of the Board*, or *in pursuance of existing laws of the Corporation: Provided*, nothing in this act shall be so construed as to prevent the Water Works' Committee, *in case of emergency*, from making all

actually necessary expenditures to keep the Water Works in such repair and condition as to keep them in active operation: *Provided further*, That nothing in this act contained shall prevent the Mayor, in case of the introduction of contagious or infectious diseases, from employing a physician for the emergency, which must be done by written order, signed by himself as Mayor; any physician otherwise employed will not be recognized as in the employment of the Corporation."

Chapter 2 of this ordinance is entitled "An Act to regulate the Allowance of Accounts and the Issuance of Corporation Checks," and provides:

"Sec. 1. Allowances of accounts and appropriations to pay the same shall be made at the first regular meeting each month of the two Boards respectively.

"Sec. 2. All checks issued by the Recorder, and by the Board of Education, after the enactment of this law, shall be countersigned by the Mayor; and the Mayor shall be required to keep accurate accounts of the checks issued, the amount of each, to whom issued, *and in what amount*,—a misprint for "on what account."

"Sec. 3. All appropriations hereafter made by the City Council, shall be of money not otherwise appropriated by law.

By an Act of the General Assembly of the 24th May, 1866, the style of the corporation was changed to "The Mayor and City Council of Nashville." This change of name required a change in the wording of the ordinances, so as to make them conform to the new nomenclature. Accordingly, the foregoing ordinances were all re-enacted under date of April 9, 1867, with only the change of the word "Board" into the words "City Council"—(see compilation of City Laws, 1868, p. 99, 100, sections 8, 9, 10, 11, 12: and p. 177, section 2.)

These were the provisions of the Charter and the City Ordinances in force during the period of the issuance of the checks in question. During this brief period of time, the checks in controversy, and other checks, to the amount of hundreds of thousands of dollars, were thrown into circulation by the persons then exercising *de facto* the ministerial offices of the city. It is not pretended that the liabilities on which these checks are supposed to be based were "authorized by existing laws or by order of the City Council," nor that

the checks themselves were issued "by authority of the City Council or in pursuance of existing laws of the Corporation." They are sought to be sustained upon the ground that municipal corporations, like private corporations, may borrow money and issue negotiable securities for any of the purposes of their incorporation, and that a *bona fide* holder for value of such securities, is entitled to enforce them, whether they were authorized by ordinance or not.

It will be noticed that by the charter and ordinances no liability could be incurred nor expenditure of the Corporation funds made, except under the order of the City Council, the legislative department of the municipal government. The mode of reaching the money in the Treasury was, after a liability had been legally incurred and the claim allowed by the Board or Council, by the Recorder drawing a warrant, called in the ordinances a check, on the Treasurer, which warrant was required to be countersigned by the Mayor. With these checks or guards on the creation of liabilities and the expenditure of moneys in the Treasury, which were eminently wise and proper, the tax payer had reason to believe that the corporate funds could only be used for corporate purposes, and the common benefit of the corporators. It would be difficult to devise a more admirable plan of checks and balances to guard against improvidence, negligence, fraud and peculation. In theory, it was as complete as human ingenuity could frame, and worked admirably until the period of demoralization which followed the civil war. And it remains to be seen whether it was not sufficient, even in that period, to protect the innocent corporator and tax-payer from the acts of unscrupulous officials and reckless speculators.

This will, perhaps, depend upon the conclusions to which the Court may come in regard to the powers of Municipal Corporations and their officers, when not restrained or modified by the charter itself. These powers have been the subjects of frequent discussion in the Courts of the United States, and of the several States, during the last few years. Until recently no distinction seems to have been made between such corporations and private corporations created for private gain. Reasoning from analogy, the Courts were inclined to hold that the same principles applied to both public and private corporations; that the powers conceded to the latter class belonged equally to the other as corporations; and that where the officers of

private corporations could bind their corporations by their acts without express authority, or even against express authority, a like power must belong to the officers of public corporations. Gradually the Courts have seen cause to doubt the correctness of the analogy, and have been widening the line of distinction between the two. It will be the object of this argument to pass in review the recent decisions, and to ascertain, if we can, whether any and what principles have been definitely settled by them upon the following points:—

1. Has a Municipal Corporation the power, without express legislative authority, to borrow money for any of the purposes of its incorporation?

2. Has it the power, without express legislative authority, to issue its paper clothed with all the attributes of negotiability?

3. Conceding the affirmative of these two queries, can the executive officers of a Municipal Corporation borrow money, or issue negotiable securities, for the Corporation, so as to bind it, without "ordinance"; that is to say, without express authority from the legislative department of the corporate government in its collective official capacity?

The weight of authority seems to be in the affirmative of each of these propositions so far as private corporations are concerned. Such corporations may borrow money and issue negotiable securities for corporation purposes. And the officers of such corporations may, under circumstances, bind their principals without express authority, or even against positive instructions. Farmer's Bank *vs.* Butcher's Bank, 14 N. Y., 623; Merchant's Bank *vs.* State Bank, 10 Wall. 604.

The principle which underlies these decisions is, that private corporations, when once created, are like individuals, and may exercise the ordinary powers of individuals in carrying out the purposes of their organization, and will be bound by the acts of its officers as an individual would be by the acts of his agents. If the officer be held out to the world as clothed with certain general authority, any act of his within the scope of such general authority will be binding upon the corporation, although he may have positive instructions in the particular act to the contrary, for the public have no means of ascertaining the restrictions, and are not bound to take notice of the specific authority under which the officer should act. The proceedings of the Directors, or other governing body of private corporations, are not open to the public, nor are they ordinarily required to be

made public. Persons who deal with such corporations have a right to presume that the officers are clothed with all the powers necessary to perfect the acts, and carry on the business usually transacted by them. The charters of such corporations do not usually prescribe the mode in which, as between the corporation and the public, the corporation shall do particular acts; nor do they make it the duty of the public, at their peril, to take notice of the directions of the governing body to its subordinates.

And herein lies the leading distinction between public and private corporations. The charters of municipal corporations usually provide that the powers conferred shall be exercised by ordinance, or enactment of the legislative department; and that these ordinances shall be published, or, at any rate, open to the inspection of the public. And without any positive provisions on the subject, it seems to follow, from the very nature and object of such corporations, as arms of the government, that they should proceed in analogy to the government itself, by the enactment of laws, and the publication thereof. Such ordinances legally passed and published have all the force and effect of statutes. "Enactments of this kind," says Sedgwick, Stat. and Const. Law, p. 462, "within the sphere of their authority, have all the force of statutes." Again, he says, p. 473, that a statute of a local or municipal character is as fatal to the validity of all contracts based on a violation of it, as if the act be one of a general character; *and a corporation ordinance is equally efficacious.*

It will be found, we think, that much of the apparent discrepancy in the authorities has been occasioned by not always bearing in mind this distinction. When the cases come to be accurately examined, and the points actually decided separated from the argument or dicta of the Judges, it will also be found that there are very few not entirely reconcilable in principle, when read by the light thus set before us. The corporate powers of a municipal corporation can only be exercised by its legislative department, and the corporation can only be bound *ex contractu* by the act of that department. The officers of the municipality, unlike the officers of private corporations, are, like the officers of the general government or the officers of the State governments, merely ministerial, to carry out the will of the legislature, and can not charge the corporation except by its express authority. And all persons who deal with the corporation, or its

officers, are bound at their peril to know whether an act is authorized, for the proceedings are open to the public, and its ordinances have all the force and effect of statutes.

The argument in favor of the power of a municipal corporation to borrow money, and to issue negotiable securities, starts out with the general proposition of Ang. & A. on Corp., § 257, thus enunciated: "In general, an express authority is not indispensable to confer upon a corporation the right to borrow money, to deal in credit, or become drawer, endorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper. It is sufficient if it be implied as the usual and proper means to accomplish the purposes of the charter"—citing a number of authorities, only two of which are cases of municipal corporations: 7 Ohio, 31, and 4 Hill, 263. The learned author adds in the same section: "Where, however, the drawing, endorsing, or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, the act becomes a nullity and not binding on the corporation." This qualification is very material in view of the purposes of public municipal corporations, and the marked difference between the relation of the officers of such a corporation to their corporators, and the relation of the officers of private corporations to their corporators. The purpose of a municipal corporation is governmental. The purpose of a private corporation is individual gain. The corporators of a municipality elect their officers for a term of office to discharge functions of a public nature, and strictly analogous to those of the officers of government. The corporators of a private corporation elect officers to perform duties of an entirely different character, and analogous to those of the agents of an individual. It is difficult to conceive of a private incorporation for purposes of individual profit, where the borrowing of money and the execution of negotiable securities would be foreign to its purposes, or repugnant thereto. And it is equally difficult to conceive of a public corporation, created for governmental purposes, where the borrowing of money or the execution of negotiable securities is not foreign to its purposes or repugnant thereto. Ordinarily, the money raised by taxation, and orders upon the treasury, are the only modes of raising or paying money necessary or proper for such corporations. Express authority from the Legislature seems essential to authorize a resort to any other mode.

The general principle enunciated as above in a treatise professedly

on private corporations, is borne out by the authorities so far as such corporations are concerned. The Supreme Court of Tennessee was one of the earliest of those Courts by whom this doctrine had been declared, and that, too, against a very strong argument by Chancellor Kent to the contrary: Union Bank *vs.* Jacobs, 6 Hum., 515. It has, also, been repeatedly held by this Court. But it does not follow that this doctrine either has been, or ought to be, applied to municipal corporations. Private corporations are generally, and always where their powers have been construed liberally in regard to borrowing money or making negotiable securities, mere organizations for private emolument, to carry on a business, by a combination of capital, and under special privileges, which any individual would have the right to undertake. There is no particular reason why the corporate entity in such cases, should not be allowed to do all that the individual might do for like purposes. But it is altogether different with municipal corporations. They are created for public purposes which no individual could do, or could be authorized by law to do. They are arms of the State government, branches of the State sovereignty, created for governmental purposes. Its officers are, like the officers of the State government, clothed with only such power as the organic law, (the charter,) or the law of the corporate legislature (the Board of Aldermen or City Council) may confer upon them. They can do nothing without positive law from the one source or the other. Their acts are otherwise *ultra vires* and void. All the authorities recognize these distinctions.

Let us now see what are the general principles recognized by the authorities, and which may be considered as settled in regard to the general powers of municipal bodies, and the mode of exercising them. "Powers of municipal corporations are express or implied. Implied powers are such as are necessary in order to carry into effect those expressly granted, and which must, therefore, be presumed to have been within the intention of the legislative grant." Cooley on Const. Lim., 194. All powers not expressly granted, or necessary to carry out those powers are denied: Cook & Steadman *vs.* Sumner Man. Co., 1 Sneed, 698; Nichol *vs.* Nashville, 9 H., 263; 4 Cold., 406; 1 Kans., 432; 8 Ind., 34; 1 Clark Ch., 223; 30 Ala., N. S., 461; 14 Me., 375; 32 Conn., 118, 131; 22 Conn., 552; 51 Me., 174, 608; 53 Me., 446; 45 N. H., 7; 13 Ohio St., 311.

A town, in the New England sense, in its corporate capacity, will

not be bound even by the express vote of the majority, to the performance of contracts, or other legal duties not coming within the scope of the object and purposes for which it was incorporated: 13 Mass., 272; 16 Ind., 48; 11 Pick., 396; 1 Met., 284; 6 Allen, 152; 12 Cush., 103; 22 Conn., 552.

"The powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the State in local government. The State can create them for no other purpose, and it can confer powers of government to no other end, without coming in conflict with the Constitutional maxim that legislative powers can not be delegated." Cooley on Const. Limitations, 211.

Nor can the Legislature clothe a municipal corporation in the State of Tennessee, with any power which is not a corporate purpose. 1 Sn., 698, *ut supra*, with the comment of Caruthers, J., page 663.

The rule is general, and applicable to the corporate authorities of all municipal bodies, that where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. If not done in the manner prescribed, the act is a mere nullity: Zottman *vs.* San Francisco, 20 Cal., 96; McSpeden *vs.* Mayor of New York, 7 Bosw., 601; 20 How., Pr., 395; Abb. Corp. Dig., 869; City of Leavenworth *vs.* Rankin, 2 Kans., 357, 371; 16 Ind., 227; 7 Gray, 12; Abb. Corp. Dig., 522; Cooley on Const. Lim., 196.

A municipal corporation can not delegate the powers, which must be exercised by its legislative branch, to any of its officers or agents: Whyte *vs.* Nashville, 2 Swan, 364; Oakland *vs.* Carpenter, 13 Cal., 540; Smith *vs.* Morse, 2 Cal., 524; Cooley on Const. Lim., 204; Sedgwick Stat. L., 164.

The power of *expending money* for public purposes in municipal corporations is lodged with the *legislative*, and not the executive authorities, and must be exercised by *ordinance legally enacted:* City of Philadelphia *vs.* Flanigan, 47 Penn. St. Rep., 21. "The power to contract is essentially a power to disburse. A valid contract is uncontrollable, demanding its performance at the hands of the judiciary, and calling to their aid the whole power of the government. It is manifest, therefore, that an independent, uncontrolled power to contract resting in the several departments, or chief officers of the city, would, in effect, take the control of their own finances out of the

hands of the people themselves, and lodge it where it would be liable to the most pernicious abuses by extravagance, favoritism, and illegal expenditure." 47 Penn. St., 23; and see Peterson *vs.* Mayor &c., of New York, 17 New York, 454; Johnson *vs.* City of Philadelphia, 47 Penn., 382.

"Municipal corporations can exercise only conferred powers, and must exercise them according to prescribed rules. The charters of such corporations are public laws; their ordinances are published before taking effect; and all their business is conducted in the most public manner. All persons can inform themselves of their powers and the manner in which they are to be exercised; and if they propose to contract with them, are bound so to inform themselves at their peril." City of Leavenworth *vs.* Rankin, 2 Kans., 357, 371; and see Mayor and C. C. of Baltimore *vs.* Eschback, 18 Md., 276; 47 Penn., 23, and 382 *ut supra.*

Where, therefore, a contract required by the municipal charter to be made by the Common Council, was made by a special committee of that body, it was held that not only was this contract invalid, but that it could not be validated by any subsequent action of the Common Council: 20 Cal., 96, *ut supra*, and see 2 Kan., 357. And so of a notice to the owner of a lot to build foot pavements, which the charter provides shall be fixed by ordinance, the City Council can not delegate this power to some of its members: 2 Swan, 364.

And where a contract, under which work was done for a municipal corporation, is void because entered into in violation of the charter, the contractor cannot recover for the work in any form, neither under the contract, nor upon a *quantum meruit;* Brady *vs.* Mayor, &c., 2 Bosw., 173, affirmed 20 N. Y., 317; 7 Abb. R., 234; 16 How. R., 432; Cooley on Const. Lim., 196. And if the officers of a municipal corporation assume to incur an obligation which it is not authorized to do, it is not made liable by the fact that it has received the consideration for the obligation; Hodges *vs.* Buffalo, 2 Denio, 110; 3 N. Y., 430; 2 Barb., 104; 17 N. Y., 449; 18 Cal. 590; Cooley on Const. Lim., 196. And the fact that money has been paid to a municipal corporation where it had no capacity or power to receive it, will not sustain an action, unless it has been appropriated by the corporation to municipal purposes by a valid ordinance; Herzo *vs.* San Francisco, 33 Cal., 134.

All these decisions are clearly founded on a proper consideration of the scope and object of municipal corporations, and the necessity of limiting the authority of their officers for the protection of the corporation. Nor have we found any cases directly in conflict, although there are general expressions of text writers and judges thrown out in considering the general powers of corporations, without being called upon specially to distinguish between public and private corporations, which might run counter to some of them. Direct decisions are believed to be all one way, and to be fully sustained by principle.

Some of these cases do hold that a municipal corporation may contract a debt upon credit, and give its notes or obligations therefor, in the prosecution of its legitimate business, and for purposes authorized by the charter: 14 N. Y., 356: 39 N. Y., 523. In the first of these cases, Ketchum *vs.* City of Buffalo, 14 N. Y., the Court expressly deny that the concession of such powers carries with it the right to borrow money. "It may be objected," they say, "that the reasoning here adopted tends to establish the right of a corporation to contract a debt for any authorized purpose by borrowing the money necessary to accomplish it; a right which, from the numerous legislative acts on the subject, it would seem corporations have not generally been supposed to possess. It is true, the power to contract to pay A $10,000 at the end of a year for doing certain work, and the power to borrow $10,000 of B upon the credit of a year, for the purpose of paying A for doing the work, might seem at first view, to be substantially identical. The amount is the same, and the time of payment is the same; the creditor only is different. A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt created cannot be diverted to any illegitimate purpose. The contract not only creates the fund, but secures its just appropriation. On the contrary, if the money may be borrowed, the corporation will be liable to repay it, although not a cent may be applied to the object for which it was avowedly obtained. It may be borrowed to build a market, and appropriated to build a theatre, and yet the corporation would be liable for the debt. The lender is in no way accountable for the use made of the money. It is plain,

therefore, that if the policy of limiting the powers and expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. If they may procure the requisite funds by the indirect method of borrowing, they may resort to any other indirect mode of obtaining them, such as establishing some profitable branch of trade, entering into commercial enterprises, &c., the avowed object being to obtain the means necessary to accomplish some authorized purpose. No one can fail to see, that to concede to corporations the power to borrow money for any purpose would be entirely subversive of the principle which would limit their operations to legitimate objects." See to same effect Curtiss *vs.* Leavitt, 14 N. Y., 62, 267.

And this is unquestionably the better doctrine, and in accord with the practice of applying for and obtaining legislative sanction to the borrowing of money upon corporation bonds.

There is more seeming conflict of the authorities on the power of a municipal corporation, without express legislative grant, to execute paper clothed with all the attributes of negotiability. But here again, we think, the conflict will be found, upon a careful examination of the decisions, to be more seeming than real. If there be an express grant of the powers, all the authorities, we believe, agree that the paper will be negotiable in the full sense of the law merchant. And of this class are all the cases decided by this Court, and to which we will more particularly direct our attention presently. On the other hand, in the absence of such legislative authority, all the cases *in which the point has been directly made* agree that the warrant, check or other instrument used for the purpose of paying money out of the treasury of the corporation, in the ordinary course of business, is not clothed with all the attributes of negotiability; Clark *vs.* City of Des Moines, 19 Iowa, 201, where the subject is fully discussed and numerous authorities cited. To those there cited may be added Bayerque *vs.* San Francisco, 1 McAll, 175; Halsted *vs.* Mayor, &c., of N. Y., 5 Barb., 218; Lucas Turner & Co. *vs.* San Francisco, 7 Cal., 462; Police Jury *vs.* Britton, 15 Wall. 566.

Some of the cases hold that an instrument is not negotiable at all, and no action can be sustained upon it except by, or in the name of the original holder. And this is the decision in Bayerque *vs.* San Francisco, 1 McAll., 175, which was an action upon a warrant of

the City of San Francisco brought in the Circuit Court of the United States for the District of California. And this is, undoubtedly, the general current of decision in regard to warrants of townships in the New England sense, counties, school districts, and the like municipal, or *quasi* municipal corporations; Smith *vs.* Cheshire, 13 Gray, 318; Sturtevant *vs.* Liberty, 46 Me., 318; Andover *vs.* Grafton, 7 N. H. 298; 26 Verm., 345; People *vs.* El Dorado County, 11 Cal., 170; Rensellaer County *vs.* Weed, 35 Barb., 136; 5 Denio, 117; Dyer *vs.* Covington Township, 19 Penn., 200; School District *vs.* Thompson, 5 Min., 280; Bullock *vs.* Curry, 1 Met., Ky., 171; 15 Wall, 566.

On the other hand, there are a few cases both of city and county warrants where it has been held that such warrants, if in form negotiable, may be passed to third persons, so as to authorize them to sue thereon in their own name. Thus, the case of Kelly *vs.* Mayor of Brooklyn, 4 Hill, 265, which is the leading case on this point, and is based entirely upon the analogy of the powers of a municipal corporation to those of a private corporation in the issuance of negotiable paper, was a suit by such a holder. The report expressly recites that: "It appeared (on the trial) that the instrument was drawn in the ordinary form and according to the usual course of business in such cases, *having been authorized by a vote of the Common Council.*" The decision is, therefore, simply that a municipal corporation may, *by express ordinance,* authorize the execution of a warrant upon its treasury, or other instrument binding upon it, in a form that will enable a subsequent holder to sue upon it in his own name. And this is the full extent of the decisions in 6 McLean, 447, Bull *vs.* Sims, 23 N. Y., 570, and Clark *vs.* Des Moines, 19 Iowa, 209. But the courts of New York and Iowa, in which these two last decisions were made, have also repeatedly held, and the Iowa courts in the very case referred to, that municipal corporations have no power, *without express legislative authority,* to bind themselves by negotiable paper, with all the incidents of negotiability; and that such paper issued without such authority has no other binding effect in the hands of a *bona fide* indorsee for value before maturity, than it would have in the hands of the orignal holder: Clark *vs.* Des Moines, 19 Iowa, 209; Halsted *vs.* Mayor of New York, 5 Barb., 218; Aff. 3 Comst., 430; Gould *vs.* Town of Ster-

ling, 23 N. Y., 459; and the case of Treadwell *vs.* Commissioners, 11 Ohio St., 183, is to the same effect.

The case of Clark *vs.* City of Des Moines, 19 Iowa, 209, is directly in point. The charter of the city of Des Moines provided that every warrant on the treasury should be signed by the Comptroller, and countersigned by the Mayor, and that no money should be drawn from the treasury unless appropriated by the City Council. The city offered to show that the warrants were issued without any authority from the City Council, and without any vote of the Council authorizing the same. It was held, upon an elaborate review of the authorities, and full consideration of the subject, that the evidence should have been admitted, and that it would constitute a complete defense.

"We have been able," say the Court by Dillon, J., "after a thorough investigation, to find no case which holds that city and county warrants, like those before us, are freed from equities in the hands of *bona fide* holders. *Nor has the plaintiff's counsel called our attention to any such.* On the other hand, we have found several cases in different States expressly holding that such orders were not commercial paper in the hands of an innocent holder, so as to exclude evidence of the legality of their issue, or preclude defenses thereto:" citing Halsted *vs.* Mayor of New York, (on audited city warrants,) 5 Barb., 218; affirmed in 3 Comst., 430, but without passing on rights of *bona fide* holder; People *vs.* El Dorado County, (on audited county warrants,) 11 Cal., 170; S. P. Sturtevant *vs.* Liberty, (town orders,) 46 Me., 318; 13 Gray, 318; 7 N. H., 298; 2 *Id.*, 251; 26 Verm., 345; 9 Ind., 224; 5 Minn., 280. And see language of Bennett, J., in Turner Lucas & Co *vs.* City of San Francisco, 7 Cal., 462 a case almost identical in facts, with the addition that the charter of San Francisco expressly authorized the creation of debts to the amount of $50,000 for any purpose allowed by the charter, and the borrowing of money on the credit of the city not to exceed that sum.

And this is the conclusion of Judge Cooley, in his able work on Constitutional Limitations, page 215 and notes, upon a careful review of the cases: "The first requisite," he says, "to the validity of such subscriptions (stock in railroads) or (issuance of negotiable) securities, would seem, then, to be a special legislative authority to make or issue them—an authority which does not reside in the general words in which the powers of local self-government are usually

conferred, and which must be followed by the municipality in all essential particulars, or the subscription or security will be void. And while mere irregularities of action, not going to the essential of the power, would not prevent parties who had acted in reliance upon the securities enforcing them, yet, as the doings of these corporations are matters of public record, *and they have no general power to issue negotiable securities*, any one who becomes holder of such securities, *even though they be negotiable in form*, will take them with constructive notice of any want of power in the corporation to issue them, and cannot enforce them when their issue was unauthorized.

The learned author, after citing the cases in notes, concludes that "it is impossible to reconcile the authorities upon the point whether, where a corporation has power to issue negotiable paper in some cases, and has assumed to do so in cases not within the charter, a *bona fide* holder would be chargeable with notice of a want of authority in the particular case, or, on the other hand, would be entitled to rely on the securities themselves as sufficient evidence that they were improperly issued, when nothing appeared on their face to apprise him of the contrary." He is, himself, of opinion that the doctrine in the case of Gould *vs.* Town of Sterling, 23 N. Y., 458, cited and relied on in Clark *vs.* Des Moines, *ut supra*, is sound, and that wherever a want of power exists, a purchaser of the securities is chargeable with notice of it, if the defect is disclosed by the corporate records, or, as in that case, by other records where the power is required to be shown.

The decisions which he cites as sustaining a doctrine in conflict with his own conclusions, are all cases of private corporations: 11 Paige, 635; 16 N. Y., 125; 24 Ind., 461; 6 El. & Bl., 327. But there are *dicta* of learned judges, which, considered abstractly from the facts of the particular case then before them, tend to extend the doubt to cases of public corporations. Thus, the language of one of the learned Justices of this Court, in Gelpecke *vs.* Dubuque, 1 Wal., 203, is very broad, and was used in the case of a municipal corporation: "Where a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority; and they are no more liable to be impeached for any infirmity in the hands of such holders, than any other commercial paper." This language is perhaps liable to criticism, and has

not passed without the comment of Courts and text writers. See 11 Ohio St., 183, and Cooley. It is probable, as we shall see presently, when the decisions of the Supreme Court of the United States are passed in review, that the language of the learned Judge has been misunderstood, and that he only means that a *bona fide* holder is not bound to inquire into the regularity of the circumstances under which the securities were issued.

The true distinction between an express or general power, which belongs to individuals and certain private corporations, and an implied or special power is admirably put by Edwards, J., in Halstead *vs.* Mayor, &c., of New York, 5 Barb., 218: "Municipal corporations," he says, "have no general power, either express or implied, to issue negotiable paper. They have only a special or conditional implied power for that purpose; and it is necessary, as a condition precedent to the validity of such paper, that the debt which forms the consideration should be contracted in the proper legitimate business of the defendants. The act under which they are incorporated is declared to be a public act. Every person who takes their negotiable paper is bound to know the extent of their powers, and is presumed to receive it with the full knowledge that they have only a limited and conditional power to issue it. *He is thus put on his inquiry, and takes it at his peril.* The circumstances under which a *bona fide* holder, without notice, receives the negotiable paper of a natural person, or of a corporation having the general or express power to issue negotiable paper, are very different. In both these instances, the power to issue such paper is general and unconditional; and hence the rules which have been established by commercial policy, for the purpose of giving currency to mercantile paper, are applicable."

Upon principle and correct analogy, it seems difficult to avoid the conclusion that a municipal corporation can neither borrow money nor issue negotiable paper, without express legislative authority, and the weight of judicial decision is in favor of this result. In view of our American experience, that the financial management of such corporations is notoriously corrupt and corrupting, that these conclusions should be uniformly reached by the Courts, is a consummation most devoutly to be wished. Neither New York, in the plenitude of the unrestricted power of its citizens, nor New Orleans, with its fettered people, has escaped the demoralization which the control of

municipal finances seems to produce. The only safety of the innocent victims lies in the firm recognition by the Courts of the doctrine that third persons who deal with such corporations, or take any of its paper, are "put on inquiry," and must act "at their peril."

If we concede, however, that a municipal corporation may borrow money, or issue negotiable securities, it remains to be considered whether these acts can be done by the executive officers of the corporation, so as to bind the corporation, without ordinance. That is to say, whether such officers can, under any circumstances, create a pecuniary liability by contract without express authority from the legislative department of the corporation. There are cases, as we have seen, where the officers of a private corporation, acting in their ordinary routine of duty, may bind their principal without express authority, or even against positive instructions. Is this true of the officers of municipal corporations?

The general rule in regard to all corporations is, that a corporation can not vary from the object of its creation, and that persons dealing with it must take notice of whatever is contained in the law of its organization: Pearce *vs.* Madison & Ind. R. R. Co., 21 How., 441; Zabriskie *vs.* Cleaveland R. R. Co., 24 How., 398, and cases cited. In the first of these cases it was held that a railroad company could not buy a steamboat, and that notes given in consideration of such purchase were *ultra vires*, and void in the hands of a person having knowledge of the consideration. So, if the power to contract does not exist, it is clear that the protection extended to an innocent holder for value, and without notice, does not apply: Marsh *vs.* Fulton County, 10 Wal., 676. And it was held in this case that where a county is authorized by statute to issue bonds for a particular purpose, and bonds are issued by the Board of Supervisors under the statute, the holder is "bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds." This is the law as respects commercial paper issued under any delegated authority. The holder must see that the paper on which he relies comes within the powers under which the delegate acts. "And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper can not be used to establish the authority

by which it was originally issued." The Floyd Acceptances, 7 Wal., 676.

On the other hand, there is a class of cases where the power is given and exercised by the proper parties, but without seeing that all the pre-requisites to the exercise of the powers were rigidly complied with. In this class of cases the *bona fide* holder is protected.

The leading case is the Commissioners of Knox County *vs.* Aspinwall, 21 How., 544. The Legislature of the State of Indiana had, by special Act, authorized the Commissioners of Knox county to issue the negotiable securities in question, upon a vote of the people of the county in favor of the purpose (the building of a railroad) for which the bonds were to be issued. The bonds came to the hands of a *bona fide* holder, and the objection made to them was, that the notices for the preliminary popular election prescribed by the statute had not been properly given. "This view," says Nelson, J., who delivers the opinion of the Court, "would seem to be decisive against the authority on the part of the board to issue the bonds, where it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held?" And the Court being of opinion that the Legislature having given the Board the power to issue the bonds, and to decide upon the fact, whether the preliminary conditions were complied with, and the Board having actually decided that the conditions had been complied with, their decision was final after the bonds had been issued. The principal case cited and relied on by Judge Nelson, is that of the Royal British Bank *vs.* Tarquand, 6 Ell. & Bl., 327, which was the case of a private company, but analogous to that then under consideration in its main feature; for there the Directors, who issued the bond in controversy, were authorized by the act of settlement to issue it upon a resolution of the shareholders, and had decided that the resolution had been made, and so it had, though informally. This point is more clearly brought out in the report of the case in banc, in 5 Ell. & Bl., 248. The suit was by Tarquand on a bond given by the Directors to secure an account then opened by Tarquand with the Bank. The plea in defense was, that the bond could only be executed by the Directors upon a resolution of the shareholders. The replication set out the resolution on which the bond was based. On demurrer, the Court held that the plaintiff was entitled to judgment, "the defendants admitting on the record that the bond was

the deed of the company, and no illegality appearing; the opening of the account with the bank being presumably within the authority of the Directors, and for the benefit of the company; and it not being shown that the obligees knew of any excess of authority, if there was any, or of any prejudice to the shareholders, and no such prejudice being shown in fact. (And this, whether or not the resolutions set out in the replication authorized the making of the bond.)

In the case of Bissell *vs.* City of Jeffersonville, 24 How., 287, the Common Council of the City of Jeffersonville were authorized, by legislative Act, to issue the bonds in controversy, upon petition of three-fourths of the legal voters, and they did issue them, adjudicating, and, as it appeared, upon a new Act of the Legislature re-adjudicating, that three-fourths of the legal voters had petitioned. Their action was, upon the authority of the previous case, held to be final.

The cases of Moran *vs.* County Commissioners, 2 Bl., 723; Mercer County *vs.* Hackett, 1 Wall., 85; Gelpecke *vs.* Dubuque, 1 Wall., 175; Van Hostrup *vs.* Madison City, 1 Wall., 271; Supervisors *vs.* Schenck, 5 Wall., 783, and Lee County *vs.* Rogers, 7 Wall., 183, are identical in principle with the case of Commissioners of Knox County *vs.* Aspinwall, and decided accordingly.

In all these cases there was express legislative authority to issue the bonds in controversy, and they were issued by the body intrusted by the Legislature with the power, and the attempt was to go behind the Act. and to show that pre-requisites to its valid exercise had not been *properly* complied with. There had, in every instance, been a decision by the persons empowered by the Act of the Legislature to make it, that the pre-requisites had been complied with.

These decisions are entirely unexceptionable, are in accord with the decisions of other courts, and, among others, of the courts of Tennessee: Adams *vs.* Memphis R. R. Co 2 Cold. 645. They only go to the extent of holding that if the body which is entrusted by the Legislature with the power of issuing bonds, upon certain conditions, determine that these conditions have been complied with, and so annouced to the world by doing the act, it is too late to question the regularity of the proceedings after the bonds have come into the hands of innocent third persons. The legal effect of these decisions is, that if a municipal corporation by its official board,

whether they be Commissioners, Mayor and Aldermen, or Common Council, do an act which they are specially authorized by statute to do upon condition, the Courts will not go behind the Act to inquire into the regularity of the performance of the conditions. In other words, if a municipal corporation, by its legislative body, do an authorized act, it will be the act of the corporation, although there may be some irregularity or excess in the exercise.

But, suppose the act is done, not by the corporation through its organs intrusted by law with the authority, but by one or more of its executive officers, is the corporation estopped to deny that it is its deed? This is altogether a different question, and one which we propose to consider.

Before reviewing the cases, let us first distinctly understand the point. The decisions are, as we have just seen, that when the corporation is authorized to issue negotiable securities, and does issue them, it can not impeach them in the hands of a *bona fide* holder. And the corporation does issue them, if the body or organ designated by the Legislature, issues them. Thus, if the Commissioners of a county are authorized by the Act of the Legislature, to issue the securities, their act is the act of the corporation. So, if the issuance is entrusted by the Legislature to the Common Council of the city, and the Common Council issue them, it is the act of the corporation. Now, what we want to find out is, whether, when the Commissioners of a county are authorized to issue bonds, they may be issued by the County Clerk and County Trustee, without the intervention of the Commissioners? or, whether, when the Legislature empowers a City Council to issue bonds, they may be issued by the Mayor and Recorder, without the sanction of the City Council? and, in either of these cases, whether the bonds will be as binding on the corporation in the hands of a *bona fide* holder, as if issued by the Commissioners in the one case, or the City Council in the other? In brief, may the executive officer, without any authority from the legislative body, do what the legislative body could do? and is the corporation estopped to deny the act in the one case as in the other? It may be that the corporation is estopped to impeach its negotiable securities in the hands of a *bona fide* holder, when issued by the City Council under authority of law. But it does not follow that it is estopped to impeach such securities when issued by its executive officers without authority from the City Council. In

the one case, it is asserting that its own act is invalid—in the other, that the act is not its act, but that of its officers.

The contrary opinion seems to originate in the apparent analogy between distinct classes of cases. Because it has been held that the Courts will not, as against a *bona fide* holder of negotiable paper issued by a corporation through that body, directly entrusted by the Legislature with the power, inquire into the pre-requisites of the issuance, it is assumed that the Courts will not, as against such a holder of paper issued by the *officer* of the corporation, inquire into the pre-requisites of its issuance. But the analogy is in appearance, not in substance. In the one case, the body which acts under legislative authority, is entrusted with the absolute power of deciding upon the pre-requisites to the exercise of its duty. In the other, the officer is a mere ministerial agent to execute a prescribed Act. The authority of the one is legislative and judicial; of the other, merely ministerial. The one is the governing body, the other a servant. No provision is made for a formal record of the preliminaries to the exercise of the power by the one, which shall be notice to all the world, while ample provision is made for notice in the other. The one is a principal, in favor of whose acts every presumption is implied; the other is an agent, into whose authority every person is bound, at his peril, to inquire.

All the authorities on the subject of agency, agree that an agent can not enlarge his authority by his own representations. This is distinctly laid down by Mr. Justice Miller, in the case of the Floyd Acceptances; is forcibly dwelt on by Judge Dillon, in the Des Moines case, and admirably expressed by Comstock, J., in the Schuyler fraud case: "Underlying," he says, "the whole subject of agency, there is this fundamental proposition, that a principal is bound only by the authorized acts of his agents. This authority may be prescribed by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world, in other instances, as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power can be established. But, in whichever way this is done, it can not be limited by secret instructions of the prin-

cipal on the one hand, nor can it be enlarged by the unauthorized representations of the agent on the other." 13 N. Y., 632.

It is a good defense to a negotiable security, even in the hands of a *bona fide* holder, that the signature is not genuine, or was made without authority. And even if the signature be genuine, the signer may show that it was written for another purpose, or under a misapprehension, fraudulently superinduced, of the character of the instrument: Whitney *vs.* Snyder, 2 Lansing, 497. So a corporation may dispute the authority of any person who may have used its name or corporate seal, no matter into whose hands the paper may have come: Koehler *vs.* Black River Co., 2 Bl., 715; City of Leavenworth *vs.* Rankin, 2 Kan., 357–371; 2 Nev. & Man., 573; 5 B. & A., 866.

We are now prepared for the decisions, and we can not do better than to commence with the decision of the Supreme Court of the United States, in the case of the Floyd Acceptances, 7 Wal., 666. The question, there, was as to the validity of the acceptances of bills of exchange by a high officer of the Government—the Secretary of War—in the hands of an innocent nolder. The Court say, p. 676: "An individual may, instead of signing with his own hands, the notes and bills which he issues, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept, in all cases, as fully as the principal could; or it may be a limited authority so draw or accept, under given circumstances, defined in the instrument which confers the power. But in each case, the person dealing with the agent knowing that he acts only by virtue of a delegated power, must, *at his peril*, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterward; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper can not be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the Government. Whenever negotiable paper is found in the market, purporting to bind the Government, it must necessarily be by the signature of an officer of the government; and the purchaser of such paper, *whether the first holder or another*, must, *at his peril*, see that the officer had authority to bind the Government."

The holders of the acceptances sought to sustain them by proof of usage in similar cases. To this the Court say: "As regards usage, it must occur at once, that if there are instances in which the use of bills of exchange by officers of government is authorized by law, as undoubtedly there are, the use of them in such cases, however common, can not establish usage in cases not so authorized." And, as if the learned Judge was aware of the erroneous inference drawn from the language of his associate, before quoted, he adds: "It can not be maintained that, because an officer can lawfully issue bills of exchange for some purposes, no inquiry can be made in any case into the purpose for which such a bill was issued. * * * Such a doctrine would enable a man in private life, to whom a well-defined and limited authority was given, to ruin the principal who had conferred it. So, it would place the government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a department to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit."

The foregoing doctrine, in its train of reasoning, places a public and private agent upon the same ground, and holds that neither can bind the principal by negotiable paper, unless authorized, and that all persons must, at their peril, see to the authority. Some of the State decisions draw a strong line of distinction between public and private agents.

"Though a private agent," says the Supreme Court of Maryland, "acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule, as to the effect of a like act of a public agent, such as the officer of a municipal corporation, is otherwise. The powers and duties of such officers are *specially defined and limited by ordinances having the character and force of public laws*, ignorance of which can be presumed in favor of no one dealing with him as to matters thus conditionally within his official discretion. A municipal corporation, therefore, can not be held liable for the unauthorized acts of its agents, though done *officii colore*, without some corporate act of ratification or adoption." Mayor of Baltimore *vs.* Eschback, 18 Md., 276.

"The power of expending money," says the Supreme Court of Pennsylvania, 47 Penn., 23, "for public purposes in municipal corporations, is lodged with the legislative, and not the executive

authorities, and must be exercised by ordinance legally enacted. * * * An independent, uncontrolled power to contract, resting in the several departments or chief officers of the city, would, in effect, take the control of their own finances out of the hands of the people, and lodge it where it would be liable to the most pernicious abuses by extravagance, favoritism and illegal expenditure."

"Some acts of corporations," says the Supreme Court of Kansas, "other than those created for governmental purposes, are to some extent, and for some purposes, estimated, measured, and construed by the same rules that apply to the acts of individuals; but municipal corporations can exercise only conferred powers, and must exercise these according to prescribed rules. * * * The charters of such corporations are public laws; their ordinances are published before taking effect; and all their business is conducted in the most public manner. All persons can inform themselves of their powers and the manner in which they are to be exercised; and if they propose to contract with them, are bound to inform themselves at their peril. * * * And the seal of a municipal corporation attached to a contract does not estop the corporation from inquiring into the power of its officers to make it." City of Leavenworth *vs.* Rankin, 2 Kan., 357, 371.

The case of Clark *vs.* City of Des Moines, as we have already seen, is directly in point. There the offer was to show that the warrants in controversy were issued without any authority from the City Council. The Court held the evidence to be admissible. "The plaintiff," say the Court, "in taking these warrants, was bound, at his peril, to ascertain the nature and extent of the powers of these officers and of the city corporation": citing 2 Hill, 159, 174; 26 Wend., 192; S. C., 8 Paige, 53; 2 Denio, 110; 17 N. Y., 242; 15 *Id.*, 341; 6 Allen, 187; 4 *Id.*, 57; 23 How., 381, 391.

"A warrant," they add, "issued by the Mayor and Recorder without the previous order of the Council, is void. They have no authority to do it; it would be substantially a forgery. A purchaser of such a warrant is bound, at his peril, at least to ascertain that the claim upon which it is founded has been liquidated and settled by the Council. A representation by municipal officers that this has been done, (and the issue of such a warrant is in substance such a representation,) will not be binding upon the corporation. Why? The answer is because an agent can neither create or enlarge his

powers by his unauthorized representations. The law on this subject has, of late years, been much investigated, and will be found discussed and examined in a most critical and exhaustive manner in the following important cases": citing Mechanic's Bank *vs.* N. Y. & N. H. R. R. Co., (Schuyler-fraud case,) 13 N. Y., 599; Farmer's Bank *vs.* Butcher's Bank, (where teller, contrary to instructions, certified a check to be good,) 14 N. Y., 623; S. C., 16 N. Y., 125; Claflin *vs.* Farmer's and Citizen's Bank, 25 N. Y., 293; Gould *vs.* Sterling, 23 N. Y., drawing distinctions between that and teller case 14 N. Y., 623; 25 N. Y., 595; 26 N. Y., 505.

"Now," continue the Court in the Des Moines case, "without entering into these interesting discussions respecting the liability of principals in *certain cases* for the acts of agents *apparently*, but not *really*, within the scope of their commission, we need only observe that, if it be conceded that the Mayor and Recorder had the apparent power to issue warrants like the one in suit, still, if they did not really have this authority, their representations that they possessed it, would not be representations of a fact, which, from its nature, (as in the case of the teller who certified the check,) rested peculiarly within the knowledge of the agent. On the contrary, the charter and journals of the corporation open to public inspection, afforded to every person the certain means of ascertaining the existence of the authority of these officers to issue warrants."

"Any other doctrine," they conclude, "nullifies the limits and checks contained in the charter for the protection of the corporation, and needlessly invests the public officers and agents with the power successfully to 'Schuylerize' our public corporations without limit and without remedy."

To the same effect is the language of Judge Cooley, Const. Lim., 196: "Even if a party is induced to enter upon work for a corporation by the *false representations of corporation officers*, that certain preliminary action had been taken on which the power of the corporation to enter upon the work depended, these false representations can not have the effect to validate a contract otherwise void, and can afford no ground of action against the corporation; but every party contracting with it must take notice of any want of authority which the public records would show": citing Swift *vs.* Williamsburg, 24 Barb., 427; Goodrich vs. Detroit, 12 Mich., 279.

"The true rule," says the Supreme Court of Ohio, in the case of Treadwell *vs.* Commissioners, 11 Ohio St., 83, is, that the want of corporate power, *or the want of authority in the municipal officers*, can not be supplied by their unauthorized acts or representations": citing Gould *vs.* Town of Sterling, and distinguishing the case of Commissioners of Knox County *vs.* Aspinwall, and the case in 6 Ell. and Bl., on which it rests, as cases of "irregularity in the proceedings of a company having power to do the act." "The distinction," say the Court, "between such cases and those where an act is illegal, or there is a want of power, is manifest."

The only cases which seem to be in conflict with this long array of authorities, are the San Francisco Gas Co. *vs.* City of San Francisco, 9 Cal., 453; De Voss *vs.* City of Richmond, 18 Grattan, 338; and Alleghany City vs. McClerkan, 14 Penn. St., 82. In the first of these cases it was said: "A municipal corporation may incur liabilities otherwise than by ordinance. Under some circumstances it may become liable by implication. It cannot avail itself of the property or labor of a party and screen itself from responsibility under the plea that it never passed an ordinance on the subject. The implication of a promise existing in such case against individuals, extends equally to corporations." But this case and the case of Argenti *vs.* San Francisco, 16 Cal., 255, based thereon, were expressly overruled in the subsequent case of Zottman *vs.* San Francisco, 20 Cal., 96, Cope, J., who delivered the opinion in Argenti *vs.* San Francisco, expressing himself as convinced of the error of the reasoning upon which his conclusions were arrived at. "The error," he says, "arose from paying too little attention to the restrictive provisions of the charter. * * The fact that the city has received a benefit, is not sufficient to create a liability on her part; for no responsibility can result as a matter of implication, where the law itself negatives the idea of its existence. It seems to be settled, that where a charter of incorporation prescribes the mode in which the contracts of the corporation are to be made, such mode must be strictly pursued or the corporation will not be bound. Individual members of a corporation have no authority to bind the corporate body, nor can a corporate engagement be implied from conduct or declarations unauthorized by the corporation or inconsistent with the charter. Corporations can not be bound except by corporate acts; and it is only by such acts, done either by the corpora-

tion as a body, or by its authorized agents, that any implication can be made, binding it in law; and no act contravening the provisions of the charter can be considered valid as a corporate act. There is no doubt of the application of this doctrine, and in the absence of a contract deriving its validity from the charter, the conclusion that the city is not liable, seems to me irresistible. The rule that corporations must act in the prescribed mode applies with peculiar force to a corporation organized for a public purpose."

The case of De Voss *vs.* City of Richmond was this: It was the practice, upon every transfer of the bonds of the City of Richmond, to surrender the bond to a special officer appointed for the purpose, who issued a new bond in lieu of the one surrendered, and who kept a record of the transaction. During the late war, the Confederate Court at Richmond undertook to confiscate a bond of the city then held by a citizen of Massachusetts, and ordered the city to issue another bond in the place of the one confiscated. The city obeyed the order of the Court, but, by ordinance, directed that the fact should be expressed on the face of the new bond, which, however, was not done. The bond thus issued was afterwards transferred and surrendered by the transferree, and a new bond obtained, in which the recital that it was in lieu of a confiscated bond was also omitted. The suit against the city was upon this last bond, and the defense was that the purchaser, when he went to the proper officer to obtain the bond in lieu of the one bought, might have traced the bond back to the confiscation, and seen that it was void. The Court conceded that any person dealing with a corporation in its public capacity was bound to take notice of its ordinances. But held that the City of Richmond, in the issuance and renewal of its bonds in the particular case, was not acting in its capacity as a public corporation, but was *quoad hoc* a private corporation. That the record kept by the officers of the surrender and re-issue of bonds was a private book, to which the public had no access, and that the purchaser was not required to take notice of its entries. The distinction thus taken between acts of a municipal corporation as a public corporation and certain other acts as to which it is to be considered only as a private corporation, was first broached in Bailey *vs.* Mayor of New York, 3 Hill, 531, and has been considered as sound in some subsequent cases in other States, for some purposes. But the distinction has been since commented on by the Court of Errors of

New York, and held (except in a very qualified sense) not to be sound: Darlington *vs.* Mayor, &c., of New York, 31 New York, 198; Roosevelt *vs.* Draper, 23 N. Y., 325. Be this as it may, the case of De Voss *vs.* Richmond, being expressly based upon this distinction, it is clear that the decision is no authority where the acts, if acts of the corporation at all, are in its public capacity, and for public purposes.

The case of Alleghany City *vs.* McClurkan & Co., 14 Penn. St., 81, was a suit brought upon notes issued by Alleghany City to circulate as money, under a general statute of the State of Pennsylvania enacted in 1828. The defense was that the statute only applied to individuals, and not to municipal corporations. But the Court held that the statute did extend to cities, and authorized them to issue change bills, and that the city was liable. But the Court having thus, in effect, decided the case, do add, that "it is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in its charter. There is a power to contract, undoubtedly; and if a series of contracts has been made openly and publicly within the knowledge of the corporators, the public have the right to presume that they are within the scope of the authority granted." This doctrine, if correct, would be based upon the principle of estoppel, like the cases of Keithsburg *vs.* Frick, 34 Ill., 421, and State *vs.* Union Township, 8 Ohio St., 401. It goes upon the ground that the *corporation* having done the acts, and having repeatedly recognized them, with full knowledge of the corporators and acquiescence on their part, the *corporation* is estopped. But such a doctrine can have no application to a case where the corporation undertakes to dispute not its own acts, but the acts of its officers.

And this leads us to the consideration of the ratification of the acts of its officers by the legislative department of a municipal corporation, and how far the knowledge of such acts by the members of that department can give them validity; and, also, what effect the receiving a benefit by the act has in validating it.

These points were fully considered by the Supreme Court of California in the case of Zottman *vs.* City of San Francisco, 20 Cal., 96. In that case, the Common Council had, by ordinance, authorized a contract for the erection of an iron fence around the public square in which the City Hall was situated, with a wooden

basement underneath the fence. The committee entrusted with the supervision of the work changed the wooden basement into stone, and had the fence painted, no provision having been made for this purpose in the contract. The city was sued for this extra work, and the charge was sought to be sustained by proof that the work was done with the knowledge and approval of the members of the Common Council, and the city had the benefit of it. "The testimony," say the Court, in their opinion, "shows that during the progress of the work all the members of the Common Council must have been aware of the order to the contractors, (for the extra work,) as the work was in full view from the windows of the Council chamber, and *was the subject of general conversation and approval by the members at their various sessions and elsewhere, and no opposition to it was ever expressed by any member.*"

Upon these facts, the Court say: "A municipal corporation derives all its powers from its charter, and where its charter prescribes the mode in which its contracts shall be made, no contract will bind the corporation unless made in that mode. As a necessary consequence, a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened on the corporation." "Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and the power to ratify in a given mode, supposes the power to contract in the same way." See Marsh *vs.* Fulton County, 10 Wal., 676, to the same effect.

"We had occasion in the case of McCracken *vs.* City of San Francisco, 16 Cal., 619, to give to this subject great consideration, and we there held that where authority to do a particular act can only be exercised in a particular form or mode, the ratification must follow such form or mode; and that a ratification can only be made when the principal possesses at the time the power to do the act ratified. The doctrines there laid down we regard of vital importance to the protection of the interests of municipal corporations. * * * Since that decision was rendered, we have had our attention called to the case of Brady *vs.* Mayor, etc., of New York, 16

How. Pr., 432, where these doctrines are affirmed in an opinion of great force."

"Individual members of the Common Council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made by any other resident of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct, impart validity to such contracts."

"Nor does the fact that the corporation has received the benefit of the work, render it liable upon a *quantum meruit*. The corporation can only act through its chosen officers and agents, (in the mode prescribed by the charter.) If they not only may pay for work and labor actually done without a compliance with the statute requisites, but are legally bound to such payment, then no contract is necessary, and the restrictions in the statute are a dead letter. If they may dispense with a contract, then, and then only, can they confirm an illegal and void contract, and then, also, by any acceptance of the work and a confirmation of the contract by resolution, they repeal the statute *pro hac vice*. The relation which the corporation and its officers bear to the subject, the duties they owe to the public and those upon whom the burden is to fall, and the nature of the powers they possess, forbid us to concede any such force to their acts."

"The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here neither the officers of the corporation, nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; *and the law never implies an obligation to do that which it forbids the party to agree to do.*

"To the application of the doctrine of liability upon an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no restrictions imposed by the law upon the party sought to be charged against making in direct terms a similar contract to that which is implied; but the party must also be in a situation where he is entirely free to elect

whether he will, or will not, accept the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere retention and use of the benefit resulting from the work, where no such power or freedom of election exists, or where the election can not influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment." (As, for example, where one puts up a house upon the land of another without request.) Citing Bartholomew *vs.* Jackson, 20 John, 28; Ellis *vs.* Hamlin, 3 Taunt., 52; Smith *vs.* Brady, 17 N. Y., 173.

It is to be noted that the charters of the cities of New York and San Francisco require that public work shall be let out, after due notice, to the lowest bidder, and the cases of Zottman *vs.* San Francisco, 20 Cal., 96, and Brady *vs.* Mayor, &c., of New York, 16 How. Pr., 432, both hold that this requirement is a pre-requisite to the validity of a contract. These cases hold, therefore, in addition to the principles cited above, that even the Common Council, as a legislative department of the City government, could not, by express enactment, ratify a contract made without this pre-requisite, and, of course, that the City could not be made liable for work not thus contracted for, upon a *quantum meruit*, or otherwise. But the citations made above only go to the general doctrine of ratification of contracts by municipal corporations, irrespective of the particular provision of the charters referred to. That doctrine is, that a municipal corporation can only be bound in the mode prescribed by the charter; that is, in ordinary cases, by ordinance. If the corporation may contract by ordinance, it is clear it may ratify by ordinance, and the ratification would be as good to effectuate the contract as if the contract had been originally authorized by ordinance. But the ratification must be in the mode in which the corporation is authorized to contract. No action of the legislative department, much less of any of the other departments, in any other mode, would be binding.

In Herzo *vs.* San Francisco, 33 Cal., 145, the case of Zottman *vs.* San Francisco, 20 Cal., 96, is cited, and expressly approved, the Court saying: "It was held in the opinion delivered by Mr. Chief Justice Field, and which is remarkable for its logical clearness and the conclusiveness of its arguments, and has since been regarded by

the profession as a leading case upon the propositions therein discussed, that the City was not liable for the extra work, and could not incur an obligation in that manner; and this on the ground that the rule applicable to the corporate authorities of all municipal bodies is, that '*when the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power.*'"

In this case of Herzo *vs.* San Francisco, the facts were, that the Common Council undertook, by ordinance, to sell some of the reclaimed lands in the bay, and Herzo became the purchaser, and paid the purchase money, which passed into the city treasury, and was used as other funds of the city. The charter required a vote of the majority of the members of the Council to make a valid sale. The Board consisted of eight members, one of whom resigned, and before the vacancy was filled the seven members met, and by a vote of four to three, ordered the sale. The Courts afterwards held the sale void, upon the ground that the ordinance was not passed by a majority of the whole Council. After the sale was decreed to be void, the purchaser brought suit against the city for the money paid by him, but judgment was given against him upon the ground that, although traced to the city treasury, it was not shown that it had ever been appropriated by the city by a specific ordinance referring to it.

"The city, in our opinion," say the Court, "not being responsible for the acts of her assumed agents up to and including the placing the money in the treasury, and the money being then the money of the plaintiff, responsibility for the money does not attach to her till she has converted it to her own use. The unauthorized act of the Treasurer in paying it out to a third person, is not the act of the city, and it makes no difference, in this respect, whether he pays it to a creditor of the city, or to any other person. The city could not rightfully do anything with the money; and to be responsible for it, she must have wrongfully converted it to her own use, and this she must have done by some corporate act, and the only act competent for that purpose was an appropriation, for that is the only manner in which she can dispose of money. The report of the Secretary of the Land Committee and of the Treasurer, and the acceptance of the reports by the Common Council, neither

changed the ownership, the custody, or control of the money—it still remained in the hands of the Treasurer, and continued the property of the plaintiff."

"It is not intended," add the Court, "to controvert the position of the plaintiff, that if the city received the plaintiff's money, she is liable in an action for its recovery, for it is correct beyond a doubt; but the important question in the case must first be decided: did she receive the money? Nor is it intended to deny it to be a rule of law that the principal, whether a natural or an artificial person, is responsible for the acts of his agents while they are acting within the scope of their employment; and, as a necessary inference therefrom, that when they are not so acting, he is not responsible."

"The immunity of the city from responsibility for the unauthorized acts of her assumed agents, can work no greater hardship than would occur if the present principal were a private corporation or person, for, in each case, those who deal with those professing to be agents must see that they are such agents, and invested with proper authority; and if they are not what they assume to be, they are responsible for their acts, and in the one case as well as in the other, the person dealing with the pretended agent may follow the property improperly obtained from him."

"The fact that the Treasurer may have paid portions or all of the money to the creditors of the city, can make no difference in principle; for if he was not empowered and directed by the city authorities to make such payment—and the only mode in which she could act in conferring such authority, was through the medium of an ordinance appropriating the money—it would amount to no more than a voluntary payment made by any other person, or the same officer, out of other funds of which he may have procured the possession, either rightfully or wrongfully, but without the direction, aid, or assent, of the city government, or any of its authorities."

We have already seen, in Zottman *vs.* San Francisco, 20 Cal., 96, that a contractor failed to recover for extra work done for the city, by a change in the original plans, although expressly authorized to do the extra work, by the committee entrusted with the supervision of the original contract; and although all the members of the Common Council must have been aware of the order for the extra

work, and the work itself was the subject of general conversation and approval by the members, at their various sessions, and elsewhere, and no opposition to it was ever expressed by any member. This is a very strong case, upon the rule that a ratification can only be in the mode in which the act could have been originally authorized.

The same subject was considered by the same Court in Phelan *vs.* County of San Francisco, 6 Cal., 531. There a particular act which the law required to be done by the Supervisors of the county was sought to be sustained by showing that, although the Supervisors had not acted upon it collectively, they had each, individually, approved it. The Court say: "We are satisfied that a legislative body, like the Board of Supervisors of a county, cannot be bound by acts *in pais*, but that the best and only evidence of its acts and intentions is to be drawn from the record of its proceedings." This is cited approvingly in Argenti *vs.* San Francisco, 16 Cal., 272, and is perhaps the only sound rule.

The weight of authority seems, therefore, to be, that the officer of a municipal corporation cannot bind the corporation without ordinance, where the charter specifies that as the mode in which the corporate powers shall be exercised. And every person who deals with such officer, or becomes the holder of negotiable securities purporting to be issued by the corporation, must, at his peril, see to the authority under which the officer acts, or the paper is issued. Any other doctrine, to use the words of this Court, in the case of the Floyd Acceptances, would enable the officers of a municipal corporation, for the time being, "to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit." And that was precisely what was done in this very case.

Many of the questions thus passed in review have been so frequently and so recently before this Court, that the argument submitted may be wholly unnecessary. The importance of the case to the City of Nashville must be our apology for again going over ground so familiar.

The last decision of the Court (Police Jury *vs.* Britton, 15 Wall., 566,) is almost directly in point. The powers claimed for corporations of local government are there restricted within proper bounds, and the implied rights upon which this suit is sought to be main-

tained, are, in effect, denied. "The power," your Honors say, "to issue such obligations [negotiable securities], and thus irretrievably to entail upon counties, parishes, and townships, a burden for which, perhaps, they have received no just consideration, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations, which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties, and parishes, have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated."

"It would be an anomaly," you add, "justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities."

The Board in control of the City of Nashville in the year 1868 and, in part, for the year 1869, until removed by the State Court of Chancery for their gross frauds and peculations, although properly charged only with certain objects of local administration, did, as this case shows, the plaintiff Ray being a citizen of the City of New York, "become the fountain of commercial issues, capable of floating about in the financial whirlpools of our large cities." Their object seemed to be to see how irretrievably they could involve the Corporation, over which our then limited franchise law permitted them to gain control, in financial ruin. They undertook to impose upon the City "burdens of a most fraudulent and iniquitous character." It is for the Court to say whether these obligations are such as to be unimpeachable in the hands of *bona fide* holders, and whether the plaintiff is such a holder. Our argument is that the

instruments sued on are not clothed with all the attributes of negotiability; that they came to the hands of the plaintiff after they were due, and many of them *functus officio*, to his knowledge; and that they are not binding upon the Corporation. The rulings of the Circuit Judge were otherwise.

By allowing the plaintiff, against the defendant's objections, to prove by parol that the checks sued on were made in the usual course of business, and issued for Corporation purposes, he placed the defendant at the mercy of the very officers who violated the charter and ordinances of the Corporation they pretended to represent. (Rec. p. 38.)

By refusing to permit us to show that a complete record of the proceedings of the Boards of the City Council was kept; that this record showed, in each month, what accounts were allowed by the City Council; and that the larger part of the checks sued on were not allowed by the Council, nor issued in pursuance of any City ordinance, the learned Judge necessarily deprived us of the very means provided by our charter and ordinances for protection against the frauds and misconduct of the City officers for the time being.

By refusing to permit us to show that one check for one thousand dollars was issued clandestinely, upon a corrupt contract with a member of the City Council, and without other authority than the direction of a member of the City Council, he opened "the doors to immense frauds on the part of petty officials and scheming speculators."

By permitting the plaintiff, over the objection of the defendant, to introduce parol evidence to prove that members of the City Council, the Mayor and other officers, in the performance of their official duties, were informed of the practice pursued by the Tax Collector to re-issue checks, and of the practice of the Chairman of the Finance Committee to order the issuance of checks, and to hypothecate them to borrow money, without any authority other than his own will, he annihilated the main object of having a City Council, namely, the protection afforded by its action in legislative assembly, by formal proceedings of record, and left the City to the vague recollection of parties interested to cover up their own misconduct. All the checks and balances of the charter, and of the ordinances and by-laws, were destroyed "at one fell swoop." "The

torch of Omar," to quote Chancellor Kent on a memorable occasion, "could not have been more sweeping and unrelenting."

The refusal to allow the defendant to prove that it had been the uniform usage of the Corporate authorities to issue no checks other than such as were ordered by the City Council, or under the provisions of existing laws, until some time after Alden became Mayor, and Mills Recorder, and until within a few months before the purchase of the checks by plaintiff; and, *per contra*, the permission to the plaintiff, over the defendant's objection, to prove a practice of *five* months' standing, in order to sustain acts otherwise in direct conflict with the charter and by-laws, and positive provisions of law made for the protection of the citizen and the safe keeping of the public funds; put the Corporation and its citizens at the mercy of the very officers who were creating a usage by a palpable violation of duty, and by a most atrocious series of wrongs. The dishonest official is allowed to become a law-maker above the Legislature of the State and his own Municipal Legislature, and the honest law-abiding citizen is left to bear the burden of his iniquity. "Naples sins, and Torre del Greco suffers."

The refusals to charge the jury as requested, and the actual charge, were in accord with the rulings as to the admission of evidence. In substance, the law, as laid down by the learned Circuit Judge, is, that, in order to bind a municipal corporation by a negotiable security, (and he expressly held the checks sued on to be "of such a character as to be unimpeachable in the hands of *bona fide* holders,") it is only necessary that it should have the forms, and be signed by the persons who were, for the time being, the officers authorized to sign warrants on the Treasury. The authority of the officers, and the authority for the issuance of the instrument, could not be inquired into. The persons who dealt with the officers, or bought the paper, were not bound to take notice of anything, or look into anything. The limitations of the charter, and of the by-laws and ordinances, intended for the protection of the Corporation, are set aside, annulled, and for nothing held. The City and its inhabitants are at the mercy of "petty officials and scheming speculators."

Lastly, even the Sax check, which was sold to the plaintiff after it had been presented to the Treasurer, and, therefore, after it was due, although sold in direct violation of the written contract, and

at a sacrifice of twenty per cent., is not subject to any equity between the City and Sax, but is good in the plaintiff's hands, as a *bona fide* holder.

If the argument we have submitted is at all well grounded, then the exceptions to the rulings of the learned Circuit Judge are well taken, and his charge clearly erroneous.

The positions we assume, and the authorities upon which we rely, may be brought together as follows:

The Act of Incorporation of the City of Nashville, of the 31st of January, 1848, is a repeal of all previous Acts of Incorporation, by virtue of the repealing clause of the 11th section, and because it does undertake to revise all previous Acts on the subject. (See Sedgwick on Stat., 126; 10 Pick., 37; 11 Pick., 350; 11 Humph., 582.) This Act does not confer upon the Corporation the power to borrow money.

The Acts of 2nd of January, 1830, and 27th of October, 1843, if not repealed by the Act of the 31st of January, 1848, only authorize the borrowing of money for specific purposes, to limited amounts, and in particular modes, and by ordinance of the legislative department of the City government. The very fact that such legislative provisions were deemed necessary, is strongly persuasive against any implied power to borrow. These Acts do not authorize the Corporation to borrow, otherwise than for the purposes, to the amounts, and in the manner, pointed out; nor its officers at all. None of the checks in controversy, issued and used for the purpose of borrowing money, were authorized by ordinance under these Acts.

The Charter of the City provides for the exercise of the Corporate functions and powers by ordinance of the legislative department. The City ordinances provide that liabilities of the Corporation can only be incurred by contract by the City Council; claims must be allowed, and appropriations made to pay the same, by the City Council; and, by like ordinances, the Recorder is expressly prohibited from drawing warrants or checks on the Treasurer, except by order of the City Council; and the Treasurer is required to disburse the Corporate funds only under the laws, ordinances, and

orders of the City Council. (See City Laws, compilation of 1868, pp. 99, 100, 107.)

Such City ordinances have all the force of public statutes. (Sedg. Stat. and Const. Law, 462, 473; 18 Md., 276; 2 Kans., 357; 19 Iowa, 209; Cooley on Const. Lim., 218 and notes.)

The "larger part" of the checks in controversy were issued without conforming to these requirements, by the Mayor, Recorder, and Chairman of the Finance Committee, of their own authority.

All power not expressly granted to municipal corporations, or necessary to carry out those powers, are denied. (Cook *vs.* Sumner Man. Co., 1 Sneed, 698; Nichol *vs.* Nashville, 9 Hum., 263; Cooley on Const. Lim., p. 194, and cases cited, 13 Ohio Stat., 311.)

Nor, in the State of Tennessee, can the Legislature constitutionally clothe a municipal corporation with power except for a corporation purpose. (1 Sneed, 698 and 663. And see Cooley Const. Lim., 211.)

The rule is general, and applicable to the Corporate authorities of all municipal bodies, that where the mode in which their power, on any given subject, can be exercised, is prescribed by the charter, this mode must be followed, otherwise the act will be a nullity. (Zottman *vs.* San Francisco, 20 Cal., 96; City of Leavenworth *vs.* Rankin, 2 Kans., 357; Shawnee County *vs.* Carter, 2 Kans., 115; 2 Bosw., 601; 20 How. Pr., 395; Abb. Corp. Dig., 522, 869; 16 Ind., 227; 18 Md., 276; 33 Cal., 134.)

The power of expending money, and consequently the power to contract for public purposes in municipal corporations, is lodged with the legislative, and not with the executive, authorities, and must be exercised by ordinance legally enacted. (City of Philadelphia *vs.* Flanigan, 47 Pa. St., 21; City of Leavenworth *vs.* Rankin, 2 Kans., 357; Mayor of Baltimore *vs.* Eschback, 18 Md., 276; 20 Cal., 96; 20 New York, 312; 33 Cal., 134; 3 N. Y., 430; 17 N. Y., 449; 18 Cal., 590.)

And the ordinance must be specific. (Johnson *vs.* Philadelphia, 47 Pa. St. 382.)

And a municipal corporation cannot delegate the powers which must be exercised by its legislative branch to any of its officers or

agents. (Whyte *vs.* Nashville, 2 Sn., 364; Oakland *vs.* Carpenter, 13 Cal., 540; Smith *vs.* Morse, 2 Cal., 524; Cooley on Const. Lim., 204; Sedg. St. and Cons. Law, 164.)

A municipal corporation cannot borrow money without express legislative authority. (Ketchum *vs.* City of Buffalo, 14 N. Y., 365; 39 N. Y., 523; Cooley on Const. Lim., 215.)

Nor issue paper with all the incidents of negotiability, without express legislative authority. (Cooley on Const. Lim., 215, and cases cited; Bayerque *vs.* San Francisco, 1 McAll., 175; Clarke *vs.* City of Des Moines, 19 Iowa, 201; Lucas Turner & Co. *vs.* San Francisco, 7 Cal., 462; Bullock *vs.* Currey, 2 Met. Ky., 171; Devily *vs.* Cedar Falls, 21 Iowa, 565; Halsted *vs.* Mayor of N. Y., 5 Barb., 218 affirmed 3 N. Y., 430; Gould *vs.* Town of Sterling, 23 N. Y., 458.)

Warrants or orders upon the Treasury of a City or County are, in their nature, not negotiable, without express authority. (Same cases, and Smith *vs.* Cheshire, 13 Gray, 318; Supervisors *vs.* Rensalaer County, 35 Barb., 136; 5 Denio, 519; Kelly *vs.* Mayor of Brooklyn, 4 Hill, 265; 6 McLean, 447; Dyer *vs.* Covington Township, 19 Pa., 200; Code of Tenn., sec. 1961.

The case of Commissioners of Knox County *vs.* Aspinwall, 21 How., 544, and other cases which follow in this Court, 24 How., 287, 2 Black., 723, 1 Wall., 85, 175, 295, 5 Wall., 783, and 7 Wall., 183, only hold that where a corporate body is expressly authorized, by legislative act, to issue negotiable paper upon certain preliminary conditions, and does issue such paper after adjudging that the conditions have been complied with, the decision is final after the paper has passed into the hands of *bona fide* holders.

But this Court has also held that, even if an officer of government (or, I presume, of a municipal corporation, which is a local government,) may lawfully execute negotiable paper for some purposes, his authority may always be inquired into in any particular case, even against a *bona fide* holder. (Floyd Acceptances, 7 Wallace, 666.)

The authorities are uniform to the same effect, and draw a line of distinction between the agent of a private person or corporation and the officers of a municipal corporation. (Mayor, &c., of Bal-

timore, *vs.* Eschback, 18 Md., 276; City of Leavenworth *vs.* Rankin, 2 Kans., 357; Clarke *vs.* City of Des Moines, 19 Iowa, 209; Lucas Turner & Co. *vs.* San Francisco, 7 Cal., 462; 13 N. Y., 632; 12 Mich., 279; 24 Barb., 427.)

And, of course, the seal of the Corporation attached to the instrument does not estop the Corporation from inquiring into the power of its officers to make it. (2 Kans., 357 and 371; Koehler *vs.* Black River Co., 2 Black, 715; 5 Bam. and Ald., 866; 2 Nev. and Man., 573; 19 Iowa, 209.)

A municipal corporation derives all its powers from its charter, and where its charter prescribes the mode in which its contracts shall be made, no contract will bind the Corporation unless made in that mode. As a necessary consequence, a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode, by any subsequent action of the Corporate authorities, and a liability be thereby fastened on the Corporation. Ratification is equivalent to a previous authority. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; *and the power to ratify in a given mode supposes the power to contract in the same way.* (Marsh *vs.* Fulton County, 10 Wal., 676; Zottman *vs.* San Francisco, 20 Cal., 96; McCracken *vs.* San Francisco, 16 Cal., 619; Brady *vs.* Mayor, 16 How. Pr., 432.)

And, *a fortiori*, contracts not made in the mode described by the charter cannot be ratified by the acts of the members of the legislative department *in pais.* (20 Cal., 96 *ut supra.*)

A legislative body cannot be bound by acts of its members *in pais;* the best and only evidence of its acts and intentions is to be drawn from the record of its proceedings. (Phelan *vs.* County of San Francisco, 6 Cal., 531; Argenti *vs.* San Francisco, 16 Cal., 272.)

And a municipal corporation is not liable for work done, unless the contract is made in the mode prescribed in the charter. (Zottman *vs.* San Francisco, 20 Cal., 96.) Nor for money paid to its Treasurer under a void contract, and used by the Treasurer in the payment of the City debts, unless expressly appropriated by the City in the mode prescribed by its charter. (Herzo *vs.* San Francisco, 33 Cal., 145.) Nor because it has received the consideration

for a supposed obligation. (Hodges *vs.* Buffalo, 2 Denio, 110; 3 N. Y., 430; 2 Barb., 104; 17 N. Y., 449; 18 Cal., 590; Cooley Const. Lim., 196.

The larger part of the checks in controversy were issued by the officers of the Corporation without the claims on which they are ostensibly based ever having been allowed by the City Council, and, in fact, without any authority from that body. Eighteen of these were, moreover, extinguished by being received by the Tax Collector, and again put into circulation without authority, and bought by the plaintiff with knowledge. The other check was made without authority, hypothecated for borrowed money without authority, and sold to plaintiff, after presentation to the Treasurer, in plain violation of a written contract with the Corporation or its officer. To hold such checks valid, would be to declare the charter and ordinances worthless forms, and that the Corporation and its citizens are at the mercy of the officers who, for the time being, may have possession of its offices and control of its Corporate seal.

W. F. & H. COOPER,

Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1873.

The Mayor and City Council of Nashville,
PLAINTIFFS IN ERROR.

vs.

WILLIAM RAY.

No. 166.

POINTS AND BRIEF OF MR. EDMUNDS,

For Defendant in Error.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE MAYOR AND CITY COUNCIL OF NASHVILLE, *Plaintiffs in Error*,

vs.

WILLIAM RAY.

No. 166.

POINTS AND BRIEF OF MR. EDMUNDS, FOR DEFENDANT IN ERROR.

FACTS.

1. The charter of Nashville, passed January 31, 1848, (Acts of Tenn., 1847–'8, p. 266,) conferred upon the city, by section 1, all the usual powers of a body corporate, and an independent power "to purchase, receive, and hold property, real and personal, within said city; and to sell, lease, or dispose of the same for the benefit of said city."

Section 2 provides for a city council, to consist of a mayor and board of aldermen.

Section 3 provides that "it shall be the duty of the mayor to take care that all the ordinances of the city are duly enforced, respected, and observed within the city," and to preside at all meetings of the council.

Section 4 provides that the council shall have power to appoint all officers, servants, and agents of the corporation, such as they may deem necessary, and may provide by ordinance, &c.

Section 6 provides for thirty-seven different powers, to

be exercised by the mayor and aldermen, besides the particular power mentioned in section 1. These powers cover every conceivable action of the city to promote its general welfare, and provide for performing its obligations. Among others is the power to levy and collect taxes; "to appropriate money, to provide for the payment of the debt and and expenses of the city;" and "to pass all ordinances not contrary to the constitution and laws of the State" necessary to carry out the full intent of the act of incorporation.

The act of the Legislature of March 16, 1868, (Acts of Tenn., 1867–'8, p. 280, sec. 10,) referred to on p. 3 of the plaintiff's brief, and quoted in full in the Record, (fols. 46, 47,) recognizes in terms the lawful existence of such checks and orders as those in question, and of their being lawfully outstanding as the evidences of the debt of the city; and it authorizes certain sorts of taxes to be paid in such checks, unless the city council shall determine otherwise. It also provides for their being paid over to the treasurer as funds. (Rec., fol. 47.)

There is no pretense of the existence of any ordinance or other act of the council making such other provision for payment in cash.

A written ordinance of the city (Rec., fols. 48, 49) provided for the duties of recorder, mayor, &c., and prohibits officers from incurring liabilities for the city, "unless authorized by existing laws, or by *order* of the city council;" and "that the recorder shall issue no check upon the treasurer, in his official character, for money, unless *by authority* of the city council;" but the water works committee are authorized to make necessary expenditures at all times. (Rec., fol. 49.)

The ordinance also required, in respect to these checks, as follows: "All checks issued by the recorder shall be countersigned by the mayor; and he shall be required to keep accurate accounts of the checks issued, the amount of each, and to whom issued. The allowance of accounts, and the appropriations to pay the same, shall be made at

the first regular meeting of each month of the two boards respectively." (Rec., fol. 50.)

2. The checks were genuine, signed and issued by the proper officers, and accepted by the treasurer. (Rec., fol. 34.)

It does not appear that any written resolution or formal written ordinance of the city council directed each of these particular checks to be issued, or, either before or after their issuance, made formal allowance of the debts or liabilities upon which they purport to have been issued. Nor does it appear that any disallowance or disapproval of the checks, or the subject of them, has ever been had by the city council.

But it does appear that, for many years prior to the time in question, it had been the custom of the corporation to issue checks in the same form, in the payment of debts, and for the treasurer to accept them, for the purpose of their drawing interest, when there was no present money for their payment; that they passed about in the city as outstanding evidences of debt of the corporation, just like the promissory notes of any business corporation; that at the time, and for several months before the making and purchase of the checks in question, such checks (the city being embarrassed) had been afloat, passed from hand to hand, received in the payment of taxes, and reissued or repaid out for the necessary purposes of carrying on the city government, and particularly in the payment of school teachers, (Rec., fols. 35, 36, 37;) that these checks, with one exception, were so received for taxes by the collector, and on the 28th January, 1869, were paid over by him to the secretary and treasurer of the school board, according to the pre-existing and current usage, for use by him in the payment of teachers; and that said treasurer sold them to the plaintiff's agent at the rate of eighty cents on the dollar, cash, which money was paid to the female teachers employed in the public schools of the defendant, and the plaintiff's agent knew that these checks had been received

for taxes and handed over to the treasurer, and used by him for the purpose aforesaid. (Rec., fols. 36, 37, 38.)

3. There is no pretense of the existence of any written law or ordinance prohibiting such a course of business. Nor is there any evidence that any of these checks were issued without a legal consideration, but the contrary. (Rec., fol. 38.)

The whole of the corporation evidence offered upon that point was, that while many of them appeared to have been issued for accounts allowed by the council, or in pursuance of some written ordinance, yet there was no evidence to be found "in the records of the council" of the other checks being issued upon any consideration or authority. (Rec., fols. 38, 39.)

4. The members of the city council, the mayor, and other city officers, had knowledge of the practice of the collector in dealing with the checks which he had received, by paying a portion of them over to the board of education, to be used in the payment of their liabilities. (Rec., fol. 41.)

5. In addition to checks issued by order of the city council, in allowance of accounts, checks were frequently issued by order of the chairman of the finance committee, without other express and formal authority. One check, called the Sax check, and another, the Duncan check, now in suit, were so issued. This practice of issuing checks by the finance committee, through its chairman, for the purposes of raising money for the use of the city, was known to the city council, and had been pursued without objection for several months.

6. The Sax check was one of a series deposited by the chairman of the finance committee as collateral security for a loan to the city, and the check was sold by its holder before the principal debt became due. But there is no evidence that his right to sell did not accrue, or that the prin-

cipal debt has been paid, or that the plaintiff or his agent had any knowledge of the seller's holding such check as collateral. (Rec., fols. 43, 44.)

7. The plaintiff purchased all these checks in good faith, and for a valuable consideration, and for cash. (Rec., fols. 34, 37, 38.)

8. Nothing appears in the record, either of testimony or offer of testimony of any specific facts, showing that any one of these checks had been issued without the city receiving a fair consideration for it.

Points.

I. There is no assignment of errors in the record, and the brief of the plaintiff in error does not seem in any sub-

stantial degree to comply with the very proper and necessary requirement of the amended 21st rule.

It is impossible to ascertain from the brief what errors are relied upon, either in the admission or rejection of testimony in the course of the trial, or in the charge of the court. It is impossible, therefore, for the defendant's counsel to know what are the points relied upon.

II. On the subject of the rejection of evidence, stated in folio 40 of the Record, no distinct point appears to be made about it in the brief of the plaintiff in error.

But if any such point can be fished out of the brief, it is enough to say, in addition to the argument touching the general merits of the case, presented in the brief of Mr. Smith, in the case argued with this one—

1. That the offer was altogether too vague and indefinite to receive application to the case. It was not an offer to prove a specific fact, upon which the court or jury could judge whether the alleged contract was corrupt, and whether the check was issued without authority.

2. In any view of the law, as to Ray's being bound to search out the origin and manner of disposition of each one of the checks, this offer, as made, would not necessarily put him upon any inquiry; for it does not follow that if the check was issued clandestinely, or upon a corrupt contract, and without authority, by the person issuing it, that Ray would be affected thereby, without its being shown specifically what were the circumstances of the issue, and whether Ray had notice thereof or not. In some cases of such issue it might be that the check would be good in his hands, if taken without notice, and in others not.

So that the court was not bound to receive an offer of testimony made in such an incomplete and mysterious way.

III. But it appears that this check was one deposited by the chairman of the finance committee, according to the usual course of business at that time, ~~with Sax,~~ as security

for a loan which went to the use of the city, and all with the knowledge and acquiescence of the city. (Rec., fols. 42, 43, 44.)

IV. It does not appear necessary to take up and wade through, *seriatim*, the other objections to, and offers of evidence made in the court below; or the requests for instructions.

V. The charge of the court itself, as to the power of the city of Nashville to issue these checks, would seem at this time to need no argument.

In addition, however, to the exhaustive argument of Mr. Smith, we insist that the unrestrained power in section 1 of the charter, to sue and be sued, and "to purchase, receive and hold property, real and personal, within the city, and to sell, lease, or dispose of the same for the benefit of the city," clearly implies a power to purchase upon credit, and to borrow money to pay for such purchases, and to issue such evidences of debt, for either of such purposes, as are usual in the ordinary course of business, and adapted to the end in view; and that the same may be said of every one of the special subjects mentioned in section 6 of the charter.

The city has power "to levy taxes," it is true, but in the same connection it has power "to provide for the payment of the debts and expenses of the city." (Sub-sections 1, 2, 3.)

If any doubt could be imagined upon such a subject, the 10th section of the act of March 16, 1868, (Rec., fols. 46, 47,) disposes of it in express terms.

It provides, first, for the valuation of property and assessment of taxes, and divides the purposes of assessments into different heads, the first of which is for the payment of coupons and interest on the bonds and funded debt of the city, which it declares shall be kept separate and distinct on the assessment roll and book, and "*payable only in*

legal currency, for which no checks or orders of the city will be received or collected."

Secondly, it provides for taxes for a sinking fund for the final redemption of such bonds and funded debt, and authorizes the city council "to determine that such taxes shall be paid in the same manner."

Thirdly, it provides for assessing taxes for "the amount necessary to be raised for the support of the public schools, *which they, in like manner, may determine shall be so payable.*"

It also provides, fourthly, for raising the amount necessary for the ordinary revenue and appropriations for the year; but it does not, as to this ordinary revenue, authorize them to require cash in payment of taxes. And in respect to those where they are required or authorized to require cash for these taxes, a failure of obedience thereto is not visited, apparently, upon any person but the offending party or officer.

It thus appears that the sovereign power of Tennessee has, in terms, recognized the lawful existence and circulation of these notes or orders of the city as outstanding in the hands of the community from time to time. And it has authorized in two instances, and in one instance apparently directed, that such notes may be receivable for taxes in the place of currency, for the purpose of supporting schools, and for the ordinary expenses of the city.

They thus stood in the treasury in the place of cash, and they could certainly, to the extent of the charge of the court, and by the common usage and consent of the council and of the officers of the city, be paid out to those who would receive them in discharge of the debts of the city, and, therefore, also for money, with which to discharge the city's debts.

We think it impossible, on a careful examination of the whole of section 10, to doubt that, except in respect to the payment of interest on its bonds or funded debt, (and, possibly, in respect to the sinking fund,) that it was the intention of the Legislature, in the distressed condition of the Southern country at that time, to provide that these city

notes and orders might be used in any way to alleviate the pecuniary embarrassments under which it and the whole South were laboring.

VI. The issuance of these checks or notes by the recorder is not required, by the by-laws, to be directed by an ordinance of the city council.

The word used in respect to this, in the by-laws, is "authority." (Rec., fol. 49.) It is not even required that this "authority" should be in writing or by any formal vote.

And neither the 10th nor the 12th section of the by-laws (Rec., fols. 49, 50) requires the allowance of accounts and appropriations to precede, necessarily, the issue of checks or notes.

The business of the city might be, and no doubt was, such as to make such a course of things as impracticable as would be the formal meeting and vote of a board of directors, and, indeed, of this council, for every act that was to be done in the course of its administration.

And so the language was changed, and the word "authority," in respect to issuing checks, was substituted for "ordinance;" and no provision was made that no checks should issue until, at a meeting of the boards, an allowance of an account and an appropriation were made. It only required that the recorder should have the "authority" of the council, or an existing law of the corporation, to issue the check, (and not even that, in the case of the water-works,) and that the checks so issued should be countersigned by the mayor, who was to keep an accurate account of the same, and of the amount of each, and to whom issued. (Rec., fols. 49, 50.)

It might just as well be contended that these checks are void for want of a proper account having been kept of their amounts, and of the names of the persons to whom issued, as to contend that they are void for want of a formal allowance and a formal appropriation at a regular meeting of the council.

The charge of the court, therefore, respecting the usage of the defendant below, stated on folio 51 of the Record,

and the want of allowance by the council in form, of the matters out of which some of these checks grew, was at least as favorable as the city could claim. (Fol. 61.)

VII. In respect to the payment of these checks by the collector to the treasurer of the school board, to be used for the payment of teachers, perhaps enough has been already said under paragraph 2 in statement of facts.

But it may be added that the charge of the court went much further in favor of the city than, it is contended, was necessary; for the court left it to the jury to find, upon uncontradicted evidence in favor of Ray, that it was the city usage, known to everybody, that such checks were paid out after having been received for taxes, for the necessary purposes of the city and its schools. (Rec., fols. 62, 63, 64.)

VIII. As to the Sax check, referred to in folios 42, 43, 44, of the Record, the charge of the court needs no vindication. It was more favorable than the city had a right to ask; for the court required the jury to find, not only the propriety of its deposit with Sax, according to usage and the course of business of the corporation, but that, if it was sold before the maturity of the note, Ray must have bought it without notice of a premature sale. Whereas, we insist that the premature sale, *with* notice, would have made no difference in Ray's right to recover, unless it had appeared that the city paid the debt to Sax at maturity, and that his right to sell never ripened.

IX. The charge of the court upon this subject was fully in accordance with the principles so often laid down in this court upon the subject of irregularities in the methods of conducting the business of municipal corporations, and with the cases of the Floyd acceptances and the Police Jury *v.* Britton. It is entirely consistent with the great body of the decisions of this and other courts, intended to protect innocent citizens against the chicanery and irregularity of officials of municipal and other corporations in their methods of doing the business which they are authorized to carry on.

7 W. 674
5 W. 566

The city of Nashville had express power to carry on the purchase and sale of property, and to carry on every branch of business affairs which the necessity of a community might require.

It had the power to provide means for so doing, and to use all the means necessary or proper to effectuate these objects.

In the method of doing its business, it had provided for itself that checks and notes for its business purposes should not be issued without the "authority" of its council. As evidence of that authority, it had provided that such checks should be signed by the recorder, countersigned by the mayor, and proper accounts kept of them. And with a view to a review of its executive transactions in doing its business, it had provided for the council making allowances and appropriations at its regular meetings.

But it had not provided that no checks should be issued preceding an allowance of the account which it was to pay; but, on its own plan, it had authorized its notes and checks to be drawn and issued by the recorder upon its "authority," and the counter-signature of its mayor.

Without going into a discussion of cases that may be very near the line, upon either side, respecting the obligation of the holder of a note to inquire into its origin, it is enough to say that the facts in this case bring it plainly into that great class of cases where justice has been accomplished through the rule of law which does not allow the managers of a corporation, municipal or otherwise, to take advantage of their own negligences and omissions, to defeat the claims of an honest holder of corporation paper, which bears upon its face all the evidence that can be given of authority and regularity. / Wall. s

Mr. Ray had a right to presume, as, for all that appears, the fact really was, that every one of these checks was issued by authority of the council, as truly as they were signed by the recorder, countersigned by the mayor, and accepted by the treasurer.

GEORGE F. EDMUNDS,
Of Counsel for Defendant in Error.

Mercer Co. v. Hackett
1 Wall. 83.

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1 Wall { 384 / 393 Meyer v. Muscatine
1 " 241 Van Hoesen v. Madison
3 " 654, Rogers v. Burlington
10 " 644, Merchts. Bk v. State Bk.
11 " 488, Eureka Co. v. Bailey Co.
13 " 304, Bailey v. Fisher
14 " 282, Lexington v. Butler
16 " 6, Lynde v. McCounty
16 " { 644 / 659 St. Joseph tp. v. Rogers